(16,825.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 262.

GILMORE G. SCRANTON, PLAINTIFF IN ERROR,

vs.

EBEN S. WHEELER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

INDEX.

	Original.	Print.
Transcript from circuit court of Chippewa county	1	1
Declaration	1	1
Plea	2	1
Stipulation to amend declaration, &c.	3	2
Amended declaration	4	2
Verdict and judgment	5	3
Order granting time to move for new trial, &c.	6	3
Clerk's certificate to verdict and judgment	6	4
Bill of exceptions	7	4
Statement of evidence	7	4
Deposition of Alfred Noble	12	7
Statement of exhibits offered	30	18
Testimony of Joseph Ripley	30	19
Plaintiff's requests to charge	32	20
Charge to jury	34	21
Assignment of errors	42	26
Judge's certificate to bill of exceptions	44	27
Exhibit "3"—Patent from United States to Peck *et al.*, October 6, 1874	45	27
6—Field-notes of survey of private claim No. 3, village of Sault Ste. Marie	47	28

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 6, 1899.

	Original.	Print.
Præcipe for writ of error	53	31
Writ of error to circuit court	54	32
Argument and submission	55	33
Opinion	56	33
Judgment	58	35
Petition for writ of error	59	35
Bond	61	36
Assignment of errors	63	37
Order granting writ of error	67	39
Citation	68	39
Citation	69	40
Petition to send up original papers	70	40
Order to send up original papers	72	41
Docket entries	73	42
Writ of error	74	42
Clerk's certificate	76	44

COPY BOUND CLOSE IN CENTER

1 *Declaration.*

STATE OF MICHIGAN:

The Circuit Court for the County of Chippewa.

STATE OF MICHIGAN, } ss:
County of Chippewa, }

Gilmore G. Scranton, plaintiff herein, by Harlow P. Davock, his attorney, comes and files this his declaration as commencement of suit, and complains of Eben S. Wheeler, defendant herein.

For that, whereas, the said plaintiff, on the twentieth day of February, in the year one thousand eight hundred and ninety-one, was the owner in fee and possessed of the following real estate and premises, situate in the city of Sault Ste. Marie, county of Chippewa, in said State of Michigan, and being known and designated as an undivided one-half interest, or portion of, in and to private land claim number three (3), Whelpley's survey, in the village of Sault Ste. Marie, Michigan, which said premises the said defendant claims in fee.

And he, the said plaintiff, being so possessed thereof, the said defendant afterwards, to wit: on the twenty-first day of February, in said last-mentioned year, entered into said premises, and unlawfully withholds from said plaintiff the possession thereof, to the damage of said plaintiff thirty-five thousand dollars, and therefore he brings suit, etc.

HARLOW P. DAVOCK,
Attorney for Plaintiff, Detroit, Mich.

BRENNAN & DONNELLY, *Of Counsel.*

2 *Plea.*

STATE OF MICHIGAN:

The Circuit Court for the County of Chippewa.

GILMORE G. SCRANTON, Plaintiff,
vs.
EBEN S. WHEELER, Defendant. } Ejectment.

And now comes said defendant, by Lewis G. Palmer, his attorney, and demands a trial of the matters set forth in the plaintiff's declaration herein.

Dated June 2, 1891.

LEWIS G. PALMER,
Defendant's Attorney.

3 *Stipulation Amending Declaration.*

STATE OF MICHIGAN:

The Circuit Court for the County of Chippewa.

GILMORE G. SCRANTON, Plaintiff,
vs.
EBEN S. WHEELER, Defendant.

It is hereby stipulated that the description in the original declaration in this cause be amended as follows: "Situated in the city of Sault Ste. Marie, in said county of Chippewa, State of Michigan, and being known and designated as an undivided one-half interest or portion of, in and to private land claim number three (3), Whelpley's survey, in the village of Sault Ste. Marie, Michigan, including therein that portion of the land beneath the water of St. Mary's river from the river bank on said lot to the thread of the stream of said river, which forms a part of said lot, and all riparian rights belonging and attached thereto and being a part thereof, which said premises the plaintiff claims in fee." Said amended declaration to stand as of the time of filing the original declaration in said cause. It is further stipulated that the plea to the original declaration now on file stand as the plead to said amended declaration, and though filed as of the date of the original plea.

HARLOW P. DAVOCK,
Attorney for Plaintiff.

L. G. PALMER,
Attorney for Defendant.

4 *Amended Declaration.*

STATE OF MICHIGAN, *County of Chippewa,* } *ss:*

The Circuit Court for the County of Chippewa.

Gilmore G. Scranton, plaintiff in this suit, by Harlow P. Davock, his attorney, comes into court, according to the form of the statute in such case made and provided, and filing this, his declaration as commencement of suit, complains of Eben S. Wheeler, defendant in this suit:

For that, whereas, the said plaintiff heretofore, to wit: on the twentieth day of February, in the year one thousand eight hundred and ninety-one, was the owner in fee and possessed of the following real estate and premises, with the appurtenances, situated in the city of Sault Ste. Marie, in said county of Chippewa, State of Michigan, and being known and designated as an undivided one-half interest, or portion of, in and to private land claim number three, Whelpley's survey, in the village of Sault Ste. Marie, Michigan, including therein that portion of the land beneath the water of St. Mary's

river from the river bank on said lot to the thread of the stream of said river, which forms a part of said lot, and all riparian rights belonging and attached thereto, and being a part thereof, which said premises the said plaintiff claims in fee; and he, the said plaintiff, being so possessed thereof, the said defendant afterwards, to wit: on the twenty-first day of February, in the year one thousand eight hundred and ninety-one, entered into the said premises and ejected the said plaintiff therefrom, and, the said plaintiff being lawfully entitled to the possession of said premises, the said defendant unlawfully withholds from said plaintiff the possession thereof, to the damage of said plaintiff of thirty-five thousand dollars, and, therefore, he brings suit, etc.

HARLOW P. DAVOCK,
Attorney for Plaintiff.

BRENNAN & DONNELLY, *Of Counsel.*

5 *Verdict and Judgment.*

GILMORE G. SCRANTON
vs.
EBEN S. WHEELER. } Ejectment.

In this cause, the parties being in court by their respective attorneys, ready for trial, thereupon came a jury of twelve good and lawful men, to wit: Robert G. Crawford, Thomas King, John Cox, John McDermid, Thomas Melvin, David Dibbs, Fred W. Wilson, Daniel Young, N. L. Field, John C. Calder, J. H. Bange and Walter Dennis, who, being duly chosen, tried and sworn well and truly to try the issue between the parties, after hearing the proofs and allegations of the parties, and the arguments of counsel, by order of the court, without leaving their seats, say upon their oath that the said Eben S. Wheeler is not guilty of unlawfully withholding from the said Gilmore G. Scranton the premises described in his declaration filed in this cause, in manner and form as the said Gilmore G. Scranton hath in his declaration in this cause alleged.

Therefore, on motion of John Power, attorney for the said Eben S. Wheeler, it is ordered and adjudged by the court now here, that the said Gilmore G. Scranton take nothing by his suit, and that the said Eben S. Wheeler do go hereof without *delay*, and that the said Eben S. Wheeler do recover against the said Gilmore G. Scranton his costs and charges by him about his defense in this
6 — above expended to be taxed, and that the said Eben S. Wheeler have execution therefor.

GILMORE G. SCRANTON
vs.
EBEN S. WHEELER. } Ejectment.

In this cause, on motion of Harlow P. Davock, attorney for the plaintiff, it is ordered and considered by the court now here, that said Gilmore G. Scranton have ninety days in which to move for a

new trial, or in which to prepare and present to this court for settlement a bill of exceptions; and that on filing a good and sufficient bond within twenty days, pursuant to the provision of the statute in such case made and provided, that all proceedings in the meantime be stayed, except taxation of costs.

J. H. STEERE,
Circuit Judge.

STATE OF MICHIGAN, } ss:
County of Chippewa, }

I, Jean Webster, deputy clerk of the circuit court of said county, the same being a court of record and having a seal, do hereby certify that I have compared the foregoing copy of judgment and verdict with the original record and files thereof now remaining in my office, and have found the same to be a correct transcript therefrom, and the whole of such original record and files.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Sault Ste. Marie, this 10th day of February, A. D. 1897.

[SEAL.]

JEAN WEBSTER,
Deputy County Clerk.

7 *Bill of Exceptions.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Chippewa.

GILMORE G. SCRANTON }
vs.
EBEN S. WHEELER. }

At a session of the circuit court for the county of Chippewa, held in the circuit court rooms, in the city of Sault Ste. Marie, on the 8th day of September, 1896.

Present: The Hon. Joseph H. Steere, circuit judge.

The above cause, being at issue, came on to be tried before the said circuit judge with a jury duly impaneled to try the same, and the plaintiff, to maintain the issue on his part, showed:

That the plaintiff was the owner in fee of the undivided half of private claim number three, in the village of Sault Ste. Marie, Chippewa county, Michigan, in said western district and northern division, according to the survey or plat of said village by Thomas Whelpley, made pursuant to the provisions of an act of Congress approved September 26th, 1850, and entitled, "An act providing for the examination and settlement of claims for land at the Sault Ste. Marie, in Michigan." A copy, said Whelpley survey, in part, is here annexed and marked Exhibit "9"—line of new pier being since added.

8 The land in question was confirmed under the provisions of that act to the heirs of Franklin Newcomb and one Peck jointly, and plaintiff derived title by mesne conveyances from the

heirs of Franklin Newcomb, by which he became the owner of the undivided half above referred to, prior to the construction of the pier by the United States Government, hereinafter stated, and plaintiff offered evidence tending to show that the undivided half of said land was worth the sum of six thousand dollars and upwards, which was disputed by the defense.

That the United States Government, through its officers, constructed what is called the new South pier, at the upper end of the Saint Mary's Falls ship canal, across the front of said private claim three, and within the boundaries of the riparian ownership of the plaintiff, as projected from the land towards the middle thread of the stream, as shown by the map or plat attached to and made a part of the deposition of Alfred Noble, which is hereinafter made a portion of this bill of exceptions.

The construction of the pier was commenced in 1877, and completed in 1881, and that the effect of the construction of the pier in question was to entirely exclude the plaintiff from all access from his land within the lateral lines of his riparian ownership, projected as aforesaid, to the navigable water or to the channel of the river that was navigable, as shown by a plat or map thereof hereto attached and marked Exhibit "1." That on both sides of the space included within such projected lines of plaintiff's riparian ownership, and between the pier and the bank of the river, the water was only five feet in depth, so that by the construction of the pier and of the maintenance thereof, plaintiff is prevented from reaching navigable water of greater depth than five feet. That plaintiff attempted to land cargo on said pier, and thus convey it to his
9 lot in question, but was prevented from doing so and driven off by the defendant, who claimed the exclusive right thereto for the United States.

That the defendant Wheeler was the superintendent of the canal, including this pier, employed by the United States, and in possession of it for and on behalf of the United States Government; that he was in such possession under such authority, and under such claim, prior to and at the time of the commencement of this suit, and continued so up to the time of the trial; that the said canal was originally constructed by the State of Michigan, through United States lands, and the location thereof and the right of way therefor were provided by an act of Congress approved August 26th, 1852, entitled, "An act granting the State of Michigan the right of way, and the donation of public land for the construction of a ship canal around the falls of Saint Mary's, in said State;" and Exhibit "2" hereto attached is the plat of the survey of the line or route of said canal referred to in sections 1 and 6 of said act.

That Exhibit "3" hereto attached is a copy of the patent of said lands issued by the Government; that the confirmation of the claim of the patentees, under the act of September 26th, 1850, was made by the Commissioner of the Land Office, as provided therein, in 1855.

That Exhibits "4" and "5," hereto attached, are plats or maps showing said private claim three, and the lateral boundary lines, as

projected as aforesaid, of plaintiff's riparian ownership, and the location of the new pier, and also of the piers of the canal, as originally constructed, together with the boundaries of the canal right of way granted under the act of August 26th, 1852. That the possession of the defendant Wheeler for the United States was exclusive and adverse to the plaintiff.

The canal, as originally constructed, was begun in 1853 and completed in 1855, and the original pier, as built, extended across
10 a portion of the front of private claim three, taking a turn to the northward into deep water, leaving, however, from three to four hundred feet of a gap, through which access to navigable water could be had from plaintiff's land; that the new pier does not follow the lines of the deep water; that the depth of the water on the land where the new South pier was built was about an average of five fet, and the whole space between where the old pier stood and the new pier was constructed had to be removed by excavation.

The rapids or falls began east of where plaintiff's eastern lateral line would strike deep water, as plaintiff claimed under the law; that the river proper in front of plaintiff's land and across his riparian front was naturally deep enough for navigation, and plaintiff's eastern lateral line, projected, reached to such deep water; that the pier or improvement in question was a part of the canal, and within the piers and between the piers as they now exist was an artificial channel, made in extension of and as a part of the canal, which was also an artificial channel, constructed through the land around the falls; that the survey and plat marked Exhibit "2" is the plat of the route of the old canal, as approved by the Secretary of War and finally selected by him.

At the request of the court the field-notes of Whelpley's survey of private claim three were introduced in evidence, and are hereto attached, marked Exhibit "6." That no map or plat showing any change in the route of the canal has been made or filed in any of the departments, with reference to the change from the old plan or route to the new one, except the plans submitted by the United States engineers to the Secretary of War, as hereinafter stated.

That before the construction of said new pier, the same
11 was recommended by the corps of engineers to the Secretary of War, with an accompanying map, a copy of which is annexed, marked Exhibit "A," and the specific work was by him approved, and said pier constructed in accordance therewith; said recommendation and approval were in accordance with the usual way of carrying on public work for the United States Government.

In 1881 the State of Michigan transferred all rights to the canal to the United States. That the South pier, as it now stands, and where it crosses in front of plaintiff's land, is more than two hundred feet from the center line of the right of way granted by the act of August 26th, 1852, as fixed by Exhibit "2."

Provided under the terms of said act, said center line after it crosses the meander line of the river was to be drawn on a curve

line conforming to the curve of the piers, as shown by the map of location approved by Secretary of War, 1853.

Counsel for defendant argued that the center line of the grant was not definitely located by the map, and established beyond the military reservation and under the waters of the river, and arguing further that said pier was constructed on a line parallel with the center line of the grant, if said center line extended in a straight line westward from the meander line of the river and parallel with said South pier, as constructed.

The court stated in its impression that the map did fix the old route of the canal, and they were bound by it unless the route was afterwards changed.

That said Saint Mary's river forms a part of the boundary line between the United States and Canada, and, where navigable, with the Great Lakes, forms a highway for interstate and international commerce. That at the falls near the point in question the said river was not navigable owing to the falls, and said canal was
12 built around the same to connect the navigable parts of the river above and below, and is used in connection therewith for the purpose of interstate and international commerce.

The plaintiff then offered in evidence the deposition of ALFRED NOBLE, with the exhibit thereto attached, which is deemed especially important by counsel for plaintiff, and at their request is here inserted in full, as follows:

Intr. 1. What is your name, age, residence and occupation?

Ans. My name is Alfred Noble; I am 48 years of age and reside in Memphis, Tennessee. By occupation I am a civil engineer.

Intr. 3. Your present work is what?

Ans. I am resident engineer of the Memphis bridge.

Intr. 4. State if at any time you were acting in a professional character for the Government?

Ans. Yes, sir; been employed as such from May, 1868, until 1892.

Intr. 5. What public work were you engaged on during the year 1887?

Ans. Saint Mary's Falls canal.

Intr. 6. Between what points does that canal extend?

Ans. It extends in the Saint Mary's river at Sault Ste. Marie.

Intr. 7. What is the nature of that work?

Ans. It is a ship canal. It is for the passage of vessels from Lake Huron to Lake Superior.

Intr. 8. What work in connection with that canal, or waterway, extends beyond the water's edge westerly?

Ans. There is a pier extending into Saint Mary's river at the western entrance of the canal on the south side.

Intr. 9. What on the north?

Ans. A shorter pier.

Intr. 10. Now, with special reference to what you designate
13 as the pier on the south side, I show you, Mr. Noble, a blue print or map by Mr. J. B. Davis, of Ann Arbor, Michigan;

now, will you state whether that map is, as you understand it, a strictly substantial illustration of that pier, its location, and that portion of the canal immediately adjacent to it?

Ans. It is substantially correct.

Intr. 11. Do you know Mr. Davis?

Ans. Yes, sir.

Intr. 12. What is his profession?

Ans. A civil engineer by profession, and assistant in the University of Michigan. I have known him since 1867.

Intr. 13. Under whose supervision was that South pier built?

Ans. It was built under my own supervision, as assistant engineer in charge.

Intr. 14. Who was the chief engineer?

Ans. Gen. Godfrey Weitzel.

Intr. 15. I call your attention to some lines, dotted lines, and other lines to be found between what is designated on the map as the North pier, 1891, and the South pier, 1891. What do you say with reference to these lines and paragraphs marked "South pier as built and North pier as built"?

Ans. So far as I can judge, they represent correctly the location of the North and South piers in 1870.

Intr. 16. That is, you mean the piers that were constructed when the canal was first built?

Ans. Not necessarily. The map represents the South pier when built, or when the canal was first constructed, and the North pier was afterwards extended.

Intr. 17. Does the map, so far as those two piers are concerned, represent substantially the piers as they were when you went there in charge of the work?

14 Ans. I should say, as to the North pier, it was nearly or quite to the extent shown on this map.

Intr. 18. How as to the South pier?

Ans. The South pier, marked on the map "the South pier as built," represented the work at that time, or the condition and location of the pier when I went there, as nearly as I can tell from the map.

Intr. 19. What was the general nature of the improvements? What under your supervision in reference to the canal?

Ans. The construction of the new lock and the straightening of the south bank of the canal at the west end.

Intr. 20. And was the cut, or channel, a part of the lock proper, and that was deepened. Was it widened?

Ans. Yes, sir, it was widened nearly the whole length from the upper end of the lock to the head of the canal. I mean the west end of the lock.

Intr. 21. What became of the old pier?

Ans. The North pier remained without change, and the South pier was removed, and the upper pier made straight.

Intr. 22. That is, the south side of the west end of the canal was made straight?

Ans. Yes, sir.

Intr. 23. By whom—or, I should have said, how?

Ans. Partially by excavating the lock within the cofferdam, and the building of the piers.

Intr. 24. Will you explain in your own way just the character and the extent of that work so far as the straightening of the south side, and the construction of the South pier, and the dredging?

Ans. The depth of the water along the line afterwards occupied by the South pier began from nothing at the shore line to
15 about sixteen feet at the extreme west end, and for the greater part of the distance was not over five or six feet deep.

Intr. 25. What was the nature of the bottom?

Ans. It was sand, so far as we could see; from an inspection of the bottom we found a large number of boulders, and at the east end of the work found a bed of rocks.

Intr. 26. How far to the northward of the South pier, as straightened out, did that shoal water extend, five or six feet?

Ans. The limit of the depth of five feet of water, as nearly as I can recollect, was very nearly a straight line drawn from the southwest corner of the old South pier to a point on the north face of the new South pier about two hundred feet east from the west end of the pier.

Intr. 27. And so, between that line so drawn and where the new South pier, so called, was located, shoal water, a depth of about five feet?

Ans. Yes, sir.

Intr. 28. Coming south of that pier, between the South pier and the shore line, what was the nature of the bottom, if you remember, and the depth of the water?

Ans. The depth gradually diminished towards the shore and the bottom was generally sandy, with perhaps some boulders at the southern limit.

Intr. 29. How did you build that South pier? What work, if anything, did you have to do to prepare for the construction of it?

Ans. The side of the pier was first dredged to a depth of about sixteen feet, the full width, or a little more than the full width, of the proposed pier.

Intr. 30. What is the length of the pier from the point where it leaves the water's edge?

Ans. It is about eighteen hundred feet from the water's edge, before the work was commenced.

16 Intr. 31. How far does it extend beyond the extreme western point of the old pier—the old South pier, so called?

Ans. It appears to be about twelve hundred feet.

Intr. 32. What was the depth of the water between the old South pier and the line of the new pier?

Ans. It was about five feet at or opposite the outer end of the old South pier, and diminished.

Intr. 33. At what point, with reference to the shore line, does the new South pier begin to diverge from the course or line of the old pier?

Ans. It diverges from the original south bank of the canal, about four hundred and fifty feet east of the original shore line.

Intr. 34. That is, the south wall of the canal, of which the South pier is an extension, begins to diverge from the old wall of the canal about four hundred and fifty feet from the shore line?

Ans. Yes, sir.

Intr. 35. What was the depth of the water in the old channel; that is, the old channel at the time that you began the construction of the new one?

Ans. About twelve feet.

Intr. 36. Was that the depth of the water between the old piers?

Ans. Substantially so. The water was a little deeper along the outer end of the North pier.

Intr. 37. Is it not a fact, Mr. Noble, that the old piers extended or were constructed out to the channel where the natural depth of the water was about twelve feet?

Ans. I don't know as to that; my recollection is different from that.

Intr. 38. Now, from looking at this map, and assuming the
17 drawing made there as to the old pier to be substantially correct, what was the general direction of those piers?

Ans. A little northwest.

Intr. 39. Assuming the same, what is the general direction of the South pier as constructed under your supervision?

Ans. A little south of west.

Intr. 40. What do you say as to that being or not being a material change in the direction of the canal at that point?

Ans. It was a material change at the west end of the canal.

Intr. 41. Now, assuming again Mr. Davis' drawing to be correct, what is the distance between the western end of the South pier, as built, or the old South pier or the point directly opposite of the new South pier?

Ans. Three hundred feet.

Intr. 42. What is the distance from the western end of the old South pier, as built, and the line of the old North pier?

Ans. Two hundred feet.

Intr. 43. When did you begin the construction of this new South pier?

Ans. We began the construction during the year ending June 30th, 1878.

Intr. 44. What was the first work done?

Ans. Dredging for the site of the pier.

Intr. 45. Where was the first dredging done?

Ans. I couldn't say at this time, exactly.

Intr. 46. Is there anything in any of your records to indicate that?

Ans. No, sir, not for the pier.

Intr. 47. What portion of the pier was first put in?

Ans. That I don't remember definitely.

18 Intr. 48. By looking at one of your reports at the close of the year, June 30th, 1878, I find that one thousand and

seventy feet of crib-work had been placed, and the west end was built two hundred and fifty feet east of the west end of the work, as finally completed. Now, how near did they come to being on a line with the west end of the old South pier?

Ans. The east end of that work was about one hundred and fifty feet east of the old South pier, east of the west end of the old South pier.

Intr. 49. How long was it from the time that you began the construction in the manner indicated until the pier was constructed and the superstructure and all of this dredging north of the South pier completed?

Ans. If I remember correctly, the work was entirely finished in 1881.

Intr. 50. By what authority were you acting as assistant engineer in charge of the improvement at Sault Ste. Marie?

Ans. Gen. Godfrey Weitzel's. He was of the corps of the United States Army.

Intr. 51. For whom was this work being done, and under whose authority was it being constructed?

Ans. Gen. Weitzel was a member of the corps of engineers, and was acting under the orders of the United States Government.

Intr. 52. And the improvement of the canal and this work that you have been testifying about was for the Federal Government?

Ans. It was, to my knowledge.

Intr. 53. Did you hold any official position in connection with the operation of the canal?

Ans. I was general superintendent of the canal.

Intr. 54. Until what time?

Ans. Until 1882. From the time that the canal was trans-
19 ferred by the State of Michigan to the United States, I think in 1881, until August, 1882.

Intr. 55. You speak of the canal being transferred by Michigan to the Government. The State had nothing to do with this work that you know of?

Ans. Nothing whatever.

Intr. 56. I will call your attention again to the map and to a line drawn from the shore in a northwesterly direction and designated as "Riparian boundary to twelve curve, as per Michigan reports." State how far that line is from the western end of the old South pier, as built, where it would intersect that pier if extended, or if the pier were extended.

Ans. That question is a little difficult to answer.

Intr. 57. Suppose the pier to be extended in a straight line from, or suppose it were extended in the same direction as the new South pier?

Ans. Assuming the map to be correct, the distance would be about two hundred and eighty feet.

Intr. 58. Have you ever had occasion to look at the map filed in the office of the War Department, and also the Land Commissioner's office, showing the survey?

Ans. Yes, sir.

Intr. 59. How long since you saw it?

Ans. At least ten years.

Intr. 60. Do you remember whether there was any substantial variation between the plat as laid down on that map and the actual construction of the old piers?

Ans. I do not.

Intr. 61. You never looked into that?

Ans. No, sir; I never looked into that.

Intr. 62. How did you come to go on this land to build that pier?

Ans. I don't remember now that the question of private
20 ownership ever occurred to us. I will say that I don't remember that it ever occurred to us before we began to work. I think Mr. M. W. Scranton remarked about it, or referred to it.

Intr. 63. Who is he?

Ans. The father of the plaintiff in this case.

Intr. 64. So far as you had anything to do with it, did you ever acquire any right from Mr. Scranton, or any one owning that land, to build the pier for the Government?

Ans. Never did.

Intr. 65. Do you remember how long after they began the work of extending that South pier out when Mr. Scranton mentioned the difficulty?

Ans. I do not.

Intr. 66. Looking at the map again, Mr. Noble, I will call your attention to a line marked "Whelpley," 1854 and 1855. Now, assuming that to be substantially correct, how far from that shore line is the easterly end of the pier?

Ans. The distance from the intersection of the South pier with the line marked "present (1891) shore line" to the point marked "new South pier" intersects the old south bank of the canal, or the shore, is about five hundred feet, assuming the map to be correct.

Intr. 67. How permanent is that pier?

Ans. A portion of the timber is above low water and will have to be rebuilt in five, six, or eight years.

Intr. 68. How effectually does it shut off approach from that part of the shore marked "southwest part, private claim No. 3," within the boundaries as laid down on the map, to the channel or deep water?

Ans. It crosses the land described.

Intr. 69. Completely?

Ans. Yes, sir.

Intr. 70. So that there is no way of obtaining access to private claim No. 3, that I have mentioned within the riparian deep
21 water as laid down on the map, except by crossing the pier?

Ans. No, sir.

Intr. 71. The space between the South pier, as originally built, and the South pier as constructed under your supervision in 1881, was used for what purpose?

Ans. It has been dredged and excavated to the depth of sixteen feet and forms part of the canal channel.

Intr. 72. And was in the possession of the United States when you were there?

Ans. Yes, sir.

Intr. 73. Referring to the question of excavating, you used that term to distinguish from the term "dredging and rock-work"?

Ans. Yes, sir.

Intr. 74. Will you explain the method adopted and followed in that excavation between the riparian boundaries there? I think one of your records shows that.

Ans. I don't know whether it shows the cofferdam or not. I am pretty certain that within the area described the material was all removed by dredging between the riparian lines.

Intr. 75. What portion of the work was done by rock excavation, rendered possible by the building of the cofferdam?

Ans. It would be approximately the area, or over the area, bounded by the south line of the new South pier to the north line of the old South pier and the eastern boundary of the claim to which you have referred, or claim No. 3.

Intr. 76. What was the necessity for building a cofferdam? Wasn't this substantial land that was taken away or excavated there?

Ans. The building of the cofferdam was necessary to
22 remove the rock and shut the water out so that the men could work in the excavation.

Intr. 77. Within that area excavated in the manner that you have just spoken of, what portion was under water?

Ans. I couldn't give the proportion with any degree of accuracy. Some portions were covered with water and other portions were above water.

Intr. 78. Is it not true, also, that that pier constructed and called "South pier" and a portion of that excavation was not under water? Didn't you extend the foundation for the pier into the land somewhat?

Ans. Yes, sir.

Intr. 79. Were you familiar with the general course of the stream there?

Ans. Yes, sir; I was.

Intr. 80. About what was the general course of the stream there?

Ans. It was nearly southwest and northeast.

Intr. 81. Now, looking at the map again, and at a line designated as the "twelve-foot curve, U. S. chart," commencing at the outer edge of the map and running to the west end of the new South pier, and taking that along then to the southern, and again crossing the South pier in a northern direction, what do you say as to that portion of the line that extends between the points where it crosses the South pier to the point where it crosses the North pier as conforming substantially to the general course of the stream there?

Counsel for defendant objects to the question on the ground that it has not been shown that any survey has been made that deter-

mines the correctness of the map in question here, or that the trend of the stream in question has been ascertained in survey or measurement, and that the testimony proposed for that reason is incompetent.

23 Ans. I can say in a general way that the course is pretty close to the direction of the stream.

Cross-examination.

By LEWIS G. PALMER, counsel for defendant:

Intr. 1. You have no particular knowledge, have you, of the direct authority or commission under which Gen. Weitzel acted on that work, except in a general way that he represented the Government?

Ans. I have seen the correspondence of Gen. Weitzel.

Intr. 2. And you were acting under him?

Ans. Yes, sir.

Intr. 3. Subject to his orders and no other orders?

Ans. Under his orders, and no other orders.

Intr. 4. Now, had you any other knowledge except that the father of the plaintiff in this case may have mentioned the matter to you, that you were interfering with any private claim in building this pier, or interfering with riparian rights?

Ans. Not to the best of my recollection.

Intr. 5. What effort, if any, was ever made by the plaintiff, or any one on his behalf, to stop the progress of this work, from the time that it began until it was completed?

Objected to by counsel for the plaintiff as incompetent.

Ans. I know of no effort of the kind.

Intr. 6. Are you acquainted with the plaintiff in this case, Gilmore G. Scranton?

Ans. Yes, sir.

Intr. 7. Did you know him during the progress of this work?

Ans. Yes, sir.

Intr. 8. Did he reside at Sault Ste. Marie?

Ans. Yes, sir; he was a minor at that time and I met him with his father.

24 Intr. 9. Did you ever notice any perceptible difference in the depth of the water before and after the building of this pier?

Ans. I never noticed any difference; in fact, I know nothing about it.

Intr. 10. What is the depth of the water at the west end of the new South pier?

Ans. It was about sixteen feet.

Intr. 11. And gradually diminished from there to the shore?

Ans. Diminished quite rapidly in going from the pier to the shore, or it diminished quite rapidly for a short distance. In going from the pier to the shore it diminished in any direction.

Intr. 12. How deep from the shore line was the water that is

marked "Whelpley, 1854 and 1855," from riparian boundary? State whether it deepens there very abruptly or gradually for some distance.

Ans. It was somewhere from three to five feet from where the boundary intercepts.

Intr. 13. Before the building of this pier, this new South pier, how near to the shore line just referred to could boats of any size approach? Could all boats drawing six, seven or eight feet of water get near to your pier where you had constructed up to the line marked "riparian boundary"?

Ans. A boat of that draft could not have reached the South pier.

Intr. 14. In what manner, if at all, did the building of this pier interfere with or obstruct access to the shore line marked "Whelpley 1854," or the private claim, the claim of Mr. Scranton, interfere in any way with navigation?

Ans. Navigation at that time was carried on with vessels exceeding six feet of draft, and in that case it would not be apt to get even with the line of the pier.

Redirect examination.

By J. C. DONNELLY, counsel for plaintiff:

Intr. 1. How far does it interfere with the 12-foot line, and going from the 12-foot line to the upland shore?

Ans. The pier closes communication by vessels.

Intr. 2. Doesn't it also prevent the construction of docks and the use of the water front and the channel bank and the deep-water line? I mean the original deep-water line.

Ans. A dock or pier built in that locality would be an obstruction to the canal, and it could not exist.

Intr. 3. So that the Government, after you finished the construction of the South pier and the entire improvements in that neighborhood, in cutting the dredging from the South pier out to the twelve-foot or sixteen-foot land, so called, was in actual possession of the entire front, or riparian front, and was using it for that pier and the canal?

Counsel for defendant objects to the question upon the ground that it is incompetent.

Ans. The area described was in constant use by vessels entering and leaving the canal.

Intr. 4. Could it have been used for that purpose unless the Government had taken possession?

Counsel for defendant objects to the question upon the ground that it is incompetent and irrelevant and immaterial.

Ans. No, it could not.

Intr. 5. So that, Mr. Noble, this improvement, including the construction of the South pier and the dredging out to the depth necessary and to conform with the depth in the canal, is in substance and

fact an artificial channel by the Government under your supervision?

26 Ans. Yes, sir.

Intr. 6. That is so between the South pier and the 12-foot land to which we have called attention, is it not?

Ans. Yes, sir, assuming the map to be correct.

Intr. 7. Without regard to the map at all, simply from your knowledge of the work, that channel is substantially an artificial one?

Ans. Yes, sir, within the limit described.

Intr. 8. If a man owned private claim 3 and desired to build a dock or wharf, as he claimed he had a right under the law, at the channel bank, or at the deep-water line, or navigable water line, so called, assuming twelve feet in the present case to be the channel bank, how could he do it after you had put in that pier and made that dredging, without planting it in the middle of that artificial channel which you have constructed?

Objected to by counsel for defendant on the ground that it is incompetent and immaterial.

Ans. It wouldn't be possible to do it without being in the artificial channel.

Intr. 9. The result of that is that if the owner of lot 3 is deprived from any cause of the use of the riparian front, isn't the effect of it, or the whole construction, to deprive him entirely of his water front?

Objected to by counsel for defendant because it is incompetent and immaterial.

Ans. So far as I can see that is a legal question rather than a fact.

Intr. 10. Referring to the question of Gen. Weitzel's authority, you were called upon from time to time to make reports of your work?

Ans. Yes, sir.

Intr. 11. In what form were those reports made?

Ans. In writing.

27 Intr. 12. They were written reports and submitted to Gen. Weitzel as the officer in charge?

Ans. Yes, sir.

Intr. 13. How frequently were you required to make those reports?

Ans. There was an annual report, which described briefly the progress of the work during the year.

Intr. 14. To whom were they made?

Ans. To Gen. Weitzel.

Intr. 15. Are you familiar with the ultimate destination of those reports?

Objected to by counsel for defendant as incompetent and irrelevant.

Ans. The reports were in substance a part in Gen. Weitzel's records as Chief Engineer of the United States Army.

Intr. 16. Who was Chief Engineer of the United States Army at that time?

Ans. I do not now remember, but I think it was Gen. Humphreys.

Intr. 17. Did the Chief Engineer of the United States Army publish an annual report of the work done under that department?

Ans. They were published by the Government.

Intr. 18. From an examination of the volumes of some of the reports do you find that any of your reports are embodied in them?

Ans. Yes, sir.

Intr. 19. What volumes have you before you?

Ans. Report for year ending June 30th, 1870, and report for year ending June 30th, 1878, and report for year ending June 30th, 1880.

Intr. 20. In those volumes do you find some of your reports?

Ans. Yes, sir.

28 Intr. 21. Designate the pages, and state whether there are any maps and charts accompanying your reports, and whether you recognize them as maps and charts attached to your reports.

Ans. On pages 922, 923, 924 of the reports for 1870, and the pages following 924, and on page 1219, a report for 1878, and the pages preceding that page, and on pages 2070 and 2071 of the report for 1880, and page 2068.

Intr. 22. Is it not a fact, Mr. Noble, that it was well understood by Gen. Weitzel and other officers connected with the improvement that in the construction of that South pier there was a serious question?

Objected to on the ground that it is incompetent and irrelevant.

Ans. I am not certain that the matter was ever brought before Gen. Weitzel.

Intr. 23. Was there any question made or brought before any one else?

Ans. I remember nothing about it, except that once Mr. Scranton mentioned it to me.

Intr. 24. In connection with the extension of the South pier, did you refer at all to the original map or plat, fixing the right of way to the canal, as was filed in the War Department?

Objected to by counsel for defendant as incompetent and irrelevant.

Ans. Not to my knowledge.

Intr. 25. Who was the contractor for the dredging?

Ans. C. S. Barker.

Intr. 26. Who paid it?

Objected to by counsel for defendant as incompetent, irrelevant, and immaterial.

Ans. I have no personal knowledge of the payments.

Intr. 27. You didn't do the disbursing?

Ans. No, sir.

29 Intr. 28. Did Barker do the work under contract?

Ans. Yes, sir.

Intr. 29. Did that include the dredging for the construction of the pier?

Objected to by counsel for defendant as incompetent and irrelevant, as the witness does not pretend to know the nature of the contract, and it is objected to because the contract is not shown to be in evidence, it being in writing is therefore the best evidence of what it contains.

Intr. 30. With whom did he have the contract?

Ans. I don't recollect the exact form of the contract. It was for the United States.

Int. 31. How did you, or from whom did you draw your pay?

Objected to by counsel for defendant as immaterial.

Ans. From Gen. Weitzel.

Intr. 32. Was Gen. Weitzel disbursing officer?

Ans. Yes, sir.

Intr. 33. Were you paid by draft on the Treasury?

Ans. I was paid by a check on the Second national bank.

Further sayeth not.

A map designated "Upper end Saint Mary's Falls canal and part of private claim 3, in section 1, T. 47 N., R. 1 W., Michigan, 1891 and 1892," is offered in evidence by counsel for plaintiff, and the counsel for defendant objects to the map being offered in evidence because the map is not offered and is not the original survey, and it is incompetent for that reason.

(Signed) ALFRED NOBLE.

Subscribed and sworn to before me, at Memphis, Tennessee, on this 14th day of April, A. D. 1892, by the said Alfred Noble, as stated in the caption hereof, and after the said witness

30 had read over the same. By agreement of counsel named in the caption hereof, no further certificate is made to this deposition.

JOHN B. CLOUGH,
Commissioner, etc.

The map above mentioned, called the J. B. Davis map, 1891-'92, is hereto attached, and is marked Exhibit No. "10."

Plaintiff then offered in evidence Exhibits "7" and "8," being certified copies of lake survey maps, hereto attached and made a part of this bill of exceptions.

Plaintiff further offered in evidence:

Exhibit "1," tracing Carlton map, entrance to canal.

Exhibit "2," blue print Jeff. Davis map of canal.

Exhibit "4," tracing *and* large scale showing P. C. 3 and old canal entrance.

Exhibit "5," tracing in large scale, showing P. C. 3 and new canal entrance.
Exhibit "7," lake survey chart of 1857.
Exhibit "8," lake survey chart down to September, 1891.
Exhibit "9," blue print of Whelpley survey.
Exhibit "A," blue print Gen. Weitzel's map, 1878.

JOSEPH RIPLEY, a witness produced and sworn on behalf of defendant, testified that he was employed by the United States as an assistant civil engineer on the St. Mary river and ship canal improvement; that he knew the defendant Wheeler since 1882, and that the defendant was general superintendent of the canal and said improvements, and the operating and care of the St. Mary's Falls ship canal; that as such superintendent he was the custodian of the Government property and land belonging to the canal, and held it for the United States; that defendant resided a portion of the time from 1882 at Detroit, and the remainder of the time at Sault Ste. Marie; that he has at no time since 1890 resided on the canal property, and that he has never lived upon the
31 premises described as private land claim No. 3 of Whelpley's survey in the village of Sault Ste. Marie or occupied any building upon it; that said defendant Wheeler never had, to witness' knowledge, any control or management or claimed any of the aforesaid described premises.

Cross-examination:

Witness testified that he knew where the South pier was, and that in drawing a line at right angles to the course of the stream, making the lateral lines of the lot, the South pier extends across the front of private land claim three; that work had been done on that pier under defendant Wheeler's supervision right along since 1891; that the character of the work was refilling the superstructure of the pier, setting out a row of trees and building a stone wall on the back of the pier. Witness testified further that this was in a way permanent work on the riparian front; that it had remained there ever since, and that defendant Wheeler was still in control of it as custodian, and in charge of the work and maintaining it. Witness testified further that there was no dredging done between the pier and dry land; that the work done previous to defendant Wheeler being in charge was a stone filling, and that the work defendant Wheeler had done was for the preservation and to make the pier more lasting and permanent; that it was very shoal water between pier and dry land, and especially in front of private land claim 3; that, as witness understood it, the pier in question was a part of the canal, and that the offices of defendant Wheeler were within the canal grounds in the vicinity of the locks and on a different private land claim.

32 Redirect examination:

The office was a little over 4,000 feet from private land claim 3; that of these several offices occupied since 1890, the closest one was

4,000 feet from private land claim 3; the work there was done by Mr. Wheeler in his capacity as superintendent of the canal and his immediate superiors were Col. Farquar, Gen. O. W. Poe and Col. Lydecker, all engineer officers in the service of the United States. They were assigned to this work by the Chief of Engineers United States Army. The pier was extended and work was done under the immediate supervision of Alfred Noble; it was started in 1877 and finished in 1881. Mr. Wheeler succeeded Alfred Noble in 1882. He had nothing personally to do with the making or original construction of the extension of the pier which brought it along in front of private land claim three. Work has been done every year in repairing and improving this pier under the immediate superintendence of defendant Wheeler, who was under the three engineer officers mentioned, who had general control of the river improvements.

Both parties then rested.

Thereupon counsel for plaintiff requested the court to charge the jury as follows:

Under the law of this State, applicable to the facts in this case, the plaintiff is the owner of the submerged land in front of his upland, bounded by lines extending from the lateral lines of his upland to the center file of the stream, and running at right angles with the course of the stream in front of the upland, and I therefore charge you that the land and property described in plaintiff's declaration belongs to and is owned by the plaintiff in fee-simple, as claimed by him, and so belonged to him when this action was brought.

33 That the pier or structure in question, as shown by the testimony, was constructed and is now maintained by the defendant across plaintiff's land without his consent and against his rights in the premises.

That neither the defendant nor the United States had any lawful right to construct said pier on and across the premises in question, this taking possession of the premises adversely to the plaintiff and excluding the plaintiff from enjoyment thereof, and from all access from his said land and premises to the navigable water of the river in front thereof, and from the navigable water of the said river to his said land.

That neither the Government of the United States nor the defendant had any lawful right to so construct said pier or to maintain the same, as was being done at the time this suit was brought, and as they are now doing, without their first having acquired the right to so construct and maintain the same from the owner of the fee, or of having obtained the right therefor by proceedings under the power of eminent domain on payment of due compensation to the owner of the land therefor.

That under article V of amendments to the Constitution of the United States, the property of the plaintiff, the property in question, being the private property of the plaintiff, could not lawfully be taken for the public use to which it was appropriated without just

compensation having been made therefor to the owner or without due process of law.

And the jury are instructed that the construction of this pier was in violation, and the maintaining of the same was in violation of said article V of the amendments to the Constitution of the United States in this, that it appears from the testimony in the case that the same was appropriated without due process of law, and the
34 same was taken and devoted to a public use without the consent of the owner thereof, and without just compensation therefor, and that the taking possession of the land of the plaintiff, as appears by the record, was in violation of said article V; and that the taking possession of the land of the plaintiff and the construction of the pier thereon, in the manner shown in this case, the effect of which was to deprive him of all egress from his said land to the navigable water, the natural navigable water of the stream, and to prevent him using his said property by passing over or across said pier, as shown in the testimony of the case, was in violation of said article V of amendments to the Constitution of the United States, and as depriving the owner thereof of his property without due process of law, and without just compensation, and without his consent.

Which said requests on the part of the said plaintiff, the said court there refused to give, and to which refusal the said counsel for said plaintiff then and there duly excepted. And thereupon the said court charged the jury as follows:

Charge to the Jury.

GENTLEMEN OF THE JURY: This is an action in ejectment, commenced in this court in 1891, to recover "an undivided one-half interest in private land claim number three, of Whelpley's survey, in the village of Sault Ste. Marie, Michigan, including therein that portion of the land beneath the St. Mary's river from the river bank on said lot to the thread of the stream of said river, which forms a part of said lot, and all riparian rights belonging and attached thereto and being a part thereof."

The material facts are not in dispute.

35 It is conceded that this action must be disposed of by the court on matters of law, and the jury directed what verdict to render.

Private claim 3 lies at the west or upper end of the St. Mary's Falls ship canal at Sault Ste. Marie, Michigan, and was patented to Samuel Peck and the heirs of Franklin Newcomb, the plaintiff's original grantors, in 1874, under an act of Congress passed in 1850, providing for the examination and settlement of claims for land at Sault Ste. Marie, in Michigan. It was surveyed under that act by Deputy United States Surveyor Whelpley, was described by metes and bounds, one line of which was "along the right bank of St. Mary's river;" the plat of survey was approved by the surveyor general at Detroit, Michigan, according to the provisions of said act

in 1855, and this claim was then confirmed to those to whom it was subsequently patented.

Under an act of Congress passed in 1852, a strip of land 400 feet in width was granted to the State of Michigan for the construction of a ship canal around the St. Mary's falls, and in 1853 the present site was platted, selected and thereupon approved by the Hon. Jefferson Davis, then Secretary of War. The canal was begun in 1853 and finished in 1855, being the same year in which the Whelpley map was finally approved. As the location of the canal was originally platted and the canal itself planned and constructed, piers were extended into the water from the west end, curving to the north, the South pier being in front of that portion of private land claim No. 3, now in controversy, but leaving a riparian frontage of about 300 feet open to deep water. The canal was constructed by the side of the rapids in dry land, excepting the comparatively short piers which extended at either end. The site was reserved from the old Fort Brady military reservation.

36 It was built, owned and operated by the State of Michigan until 1881, when it was transferred to the United States. The Federal Government had been making appropriations and conducting extensive improvements at this point for several years prior to the date the canal was turned over, and as a part of those improvements the west end of the canal had been straightened out, and the South pier, which gives rise to this controversy, had been extended entirely across the frontage of private claim No. 3, excluding any access therefrom to navigable water.

The extension of this pier was begun in 1877 and completed in 1881.

Private claim No. 3 lies on the bay at the head of the St. Mary's falls on the south side. The water in front of it was, in its natural condition, navigable, but shoal for some distance from the shore. The natural navigation of Lake Superior, obstructed by the falls, terminated there.

The new pier was sunk in a dredge cut made from deep water through the shoal to the shore, and the space between the two piers was then dredged out, giving a deep and broad entrance to the canal from the river above.

The entrance to Lake Superior is some eight miles above the canal, and the pier was not required as a shelter from floods or storms. Its manifest purpose was to retain the embankment on the south side of the canal extension, to furnish moorage for vessels, a substantial place from which to check and guide them as they passed in and out of the canal, and probably for the maintenance of lights. It was maintained as a part of the St. Mary's Falls ship canal, and was under the control and direction of its officers.

Mr. Wheeler, the defendant, though personally sued, has no personal interest in the property in dispute. As an officer of
37 the United States Government and superintendent of this canal, he was in possession and control of the said pier at the time of the commencement of this suit.

As far as the testimony discloses, no improvements have ever been made or attempted upon claim 3 by the plaintiff or his grantors. He at one time attempted to use the pier in controversy for unloading a cargo, and was prevented by the defendant Wheeler, who was then in possession of it in his official capacity as superintendent of the canal, and who, as such, denied to the plaintiff the use of the pier and asserted exclusive, and necessarily adverse, possession.

This cause was removed to the Federal courts shortly after its commencement, on the ground that the Government was the real party in interest, and that the defense depended upon the construction of United States laws, but it has finally been remanded to this court for trial.

The United States district attorney has here followed a practice which seems to meet the approval of the Supreme Court of the United States, and intervened to file a suggestion, calling to this court the fact that the property in controversy, the title and possession of which are the subjects of this litigation, is and has been for many years in the possession of the United States, through its officers and agents, held for public uses in connection with the commerce and navigation of the Great Lakes; that the nominal defendant has no personal interest in the matter; that his physical possession of the premises is in his official capacity and in law the possession of the United States; that the United States has always held title to the said land, and now holds possession under its claim of title; that this action is in effect an action against the United States Government, which in its sovereign capacity cannot be sued; and
38 for these reasons asks that all proceedings be stayed and the suit dismissed.

That the defendant holds as agent, under a claim of right and title in the United States, is manifest, but it is contended by counsel for plaintiff that the doctrine that the United States cannot be sued except by authority of Congress has no application here and cannot be invoked where officers and agents of the Government, while in possession of real estate claimed by the Government, are sued in ejectment by one claiming title and right of possession.

Such is the holding of the Supreme Court of the United States in the elaborately discussed case of The United States against Lee, 106 U. S., 196. Since that decision was rendered the principles there announced have been recognized by the subordinate courts as of general application and were followed by the Federal courts before whom this case has heretofore gone.

It is to be observed that the decision referred to was reached with difficulty and sustained by only a bare majority of one, four judges of the Supreme Court, including the Chief Justice, joining in a lengthy and carefully considered dissenting opinion.

Whether an action in ejectment was anything more than a possessory action under the local laws applicable to the case they were deciding, we are unable to state, but the judgment in that case was only for possession.

In the more recent case of Stanley *vs.* Schwalby, 162 U. S., 255,

submitted and decided in 1896, the question was again presented to the Supreme Court by Solicitor General Conrad. The decision then rendered, though not in express terms overruling the Lee case, announces principles worthy of consideration in connection with the case at bar.

39 That was an action brought in the district court of the State of Texas by Mary A. Schwalby and her husband against General Stanley and other army officers to try the title to a parcel of land which formed part of the military reservation of San Antonio, Texas. The plaintiff claimed title in one-third of the disputed tract, and possession of the whole.

The district attorney set up, amongst other things, the defense that the suit was, in effect, against the United States, and could therefore not be maintained. The plaintiff had judgment in the lower courts, and in reversing the case, the Supreme Court says: "The judgments of the courts of the State of Texas appear to have been largely based on United States against Lee, 106 U. S., 196. In that case an action of ejectment was brought in the circuit court of the United States against officers occupying, on behalf of the United States, lands used for a military station and for a national cemetery. The Attorney General filed a suggestion of these facts and insisted the court had no jurisdiction. The plaintiffs produced sufficient evidence of their title and possession, and the United States proved no valid title. This court held that the officers were trespassers and liable to action, and therefore affirmed the judgment below, which, as appeared by the record of that case, was simply a judgment that the plaintiff recover against the individual defendants the possession of the land described and costs, and this court distinctly recognized that if the title of the United States were good it would be a justification of the defendants—that the United States could not be sued direct by original process, as a defendant, except by authority of an express act of Congress."

"In an action of trespass to try title, under the laws of Texas, a judgment for the plaintiff is not restricted to *possession*, but may be (as was in this case) for *title* also. By Tex. Rev. Stat., sec.

40 4784, the method of trying title to lands, tenements or other real property shall be by action of trespass to try title."

"By sec. 4811, the judgment shall be conclusive as to the title or right of possession established in such action upon the party against whom it is recovered, and upon all parties claiming from, through or under such party, by title arising after the commencement of such action."

"In the case at bar (Schwalby *vs.* Stanley) the United States, and their agents in their behalf, claimed title in the whole of the land. The plaintiffs claimed title in one undivided third part only. The final decision below was against the claim of the intervenor for another third part of the land. It was thus adjudged that the United States had the title in that part, if not also in the remaining third, to which no adverse claim was made. Such being the state of the case, the final judgment in favor of the plaintiffs for the third part awarded to them, and for possession of the whole, jointly with the

individual defendants, was directly against the United States and against their property, and not merely against their officers."

Applying the principles announced in that decision upon the facts there involved to the case now on trial, we find the plaintiff here claiming title to an undivided one-half of the land in controversy and possession of the whole. The defendant Wheeler is in possession as an officer of the Government, with no personal interest, as were Gen. Stanley and the other army officers in that case. In this case, as in that, the United States, and their officers in their behalf, claim title in the whole of the property in their possession and now in dispute.

In this action under our Michigan laws, as in that action under the Texas laws, a judgment for the plaintiff is not restricted to *possession*, although ejectment is, in Michigan, primarily a pos-
41 sessory action, but may be for *title* also. In truth, under the pleadings and proofs in this case, the judgment must be for title if plaintiff prevails. How. Stat., sec. 7815.

In this State ejectment generally determines the title. The action, as modified by our statutes, amplified and enlarged in its scope, with all fictitious parties, demises, etc., abolished, is the usual method of trying title to lands, tenements or other real property, just as the action of trespass to try titles is in Texas. "Our statute has substantially superseded the old action of ejectment, with its fictions and wearisome forms, and has given, under the same name, a much broader and more potent remedy. As marked out by the legislature, it has the effectiveness of a real action. It is a proceeding to try titles, as well as to determine who has the right of possession. It is made applicable to cases where formerly a writ of right was the appointed remedy, and it is the only action for the determination of titles to land."

45 Mich., p. 90.

The wording, as the nature of the judgment in ejectment found in our statute, is similar to that found in the Texas statute, and is as follows:

"Every judgment in the action of ejectment rendered upon a verdict shall be conclusive as to the title established in such action upon the party against whom the same is rendered, and against all parties claiming, through, from or under such party, by title accruing after the commencement of such action, subject to the exceptions hereinafter contained."

A verdict in this case in favor of the plaintiff must necessarily be for his title in fee of an undivided one-half of the premises in controversy, and possession of the whole, jointly with defendant
42 Wheeler, which would be, in effect, a judgment against the United States and its property.

As the facts just suggested seem to me to dispose of the case, I do not deem it essential to review the able arguments presented by counsel as to the respective rights of the plaintiff and the Government in the submerged lands across which the pier which gave rise

to this litigation stands. The jury will render a verdict for the defendant. The clerk will take and record the verdict.

And thereupon the plaintiff excepted to the charge of said court directing a verdict for defendant.

And thereupon the jury rendered a verdict for the defendant and against the plaintiff.

Assignment of Errors.

And now comes the said Gilmore G. Scranton by John C. Donnelly and Harlow P. Davock, his attorneys, and says that in the record and proceeding there is manifest error, to wit:

1. The court erred in refusing to give the plaintiff's request to charge:

That under the law of this State applicable to the facts in this case the plaintiff is the owner of the submerged land in front of his upland, bounded by lines extending from the lateral lines of his upland to the center file of the stream and running at right angles with the course of the stream in front of the upland, and I therefore charge you that the land and property described in plaintiff's declaration belongs to and is owned by the plaintiff
43 in fee-simple, as claimed by him, and so belonged to him when this action was brought.

That the pier or structure in question, as shown by the testimony, was constructed and is now maintained by the defendant across plaintiff's land without his consent and against his rights in the premises.

That neither the defendant nor the United States had any lawful right to construct said pier on and across the premises in question, this taking possession of the premises adversely to the plaintiff and excluding the plaintiff from enjoyment thereof, and from all access from his said land and premises to the navigable water of the river in front thereof and from the navigable water of the said river to his land.

That neither the Government of the United States nor the defendant had any lawful right to so construct said pier, or to maintain the same, as was being done at the time this suit was brought, and as they are now doing, without their first having acquired the right to so construct and maintain the same from the owner of the fee, or of having obtained the right therefore by proceedings under the power of eminent domain on payment of due compensation to the owner of the land therefor.

That under article V of amendments to the Constitution of the United States, the property of the plaintiff, the property in question, being the private property of the plaintiff, could not be lawfully taken for the public use, to which it was appropriated without just compensation having been made therefore to the owner or without due process of law.

And the jury are instructed that the construction of this pier was in violation, and the maintaining of the same was in violation, of said article V of the amendments to the Constitution of the United

States in this, that it appears from the testimony in the case
44 that the same was appropriated without due process of law, and the same was taken and devoted to a public use without the consent of the owner thereof and without just compensation therefor, and that the taking possession of the land of the plaintiff, as appears by the record, was in violation of said article V; and that the taking possession of the land of the plaintiff and the construction of the pier thereon, in the manner shown in this case, the effect of which was to deprive him of all egress from his said land to the navigable water, the natural navigable water of the stream, and to prevent him using his said property by passing over or across said pier, as shown in the testimony of the case, was in violation of said article V of amendments to the Constitution of the United States, and as depriving the owner thereof of his property without due process of law, and without just compensation, and without his consent.

2. In directing the jury to render a verdict in favor of the defendant and against the plaintiff.

And because none of the exceptions so taken and made to the decisions and opinions of the circuit judge do appear upon the record of said trial, therefore, on the prayer of the said plaintiff, by his counsel, the circuit judge hath signed this bill of exceptions, which contains a substantial statement of all the evidence introduced on the trial of said cause, according to the statute in such case made and provided, this day, February 10, 1897.

JOSEPH H. STEERE,
Circuit Judge.

45 EXHIBIT "3"—DEED.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, under the provisions of the act of Congress, approved the 26th day of September, 1850, entitled "An act providing for the examination and settlement of claims for land at the Sault Ste. Marie, in Michigan," the claim of Samuel Peck and heirs of Franklin Newcomb has been confirmed to a tract or parcel of land designated on the connected plat of survey, approved under date of September 4th, 1855, by the surveyor general at Detroit, made pursuant to the act aforesaid as lot number three, containing nineteen acres and forty-five one-hundredths of an acre, in section one, in township forty-seven north of range one west, and in section six, in township forty-seven north of range one east, in the district of lands subject to sale at Marquette, formerly Sault Ste. Marie, in the State of Michigan; and, whereas, there has been deposited in the General Land Office of the United States a certificate No. 111, of the register and receiver at Marquette, Michigan, whereby it appears that payment has been made in full, according to law, of the amount of assessment on said claims.

Now know ye: that the United States of America, in consideration of the premises and in conformity to the provisions of the act

of Congress aforesaid, have given and granted, and by these presents do give and grant unto the said Samuel Peck, and heirs of Franklin Newcomb, and to their heirs, the tract or parcel of land above described; to have and to hold the same, together
46 with all the rights, privileges and immunities and appurtenances of whatever nature thereunto belonging unto the said Samuel Peck and heirs of Franklin Newcomb and to their heirs and assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

[SEAL.]

Given under my hand, at the city of Washington, the sixth day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

By the President:

U. S. GRANT,
By S. D. WILLIAMS, *Secretary.*

L. K. LIPPINCOTT,
Recorder of the General Land Office.

Recorded vol. 1, page 164.

STATE OF MICHIGAN, }
Register's Office, Chippewa County. }

This is to certify that I have compared the annexed copy of deed recorded in Liber 5 of Deeds, on page 217, with the original now remaining of record in this office, and that the same is a true and correct copy of such original, and all of such original.

In testimony whereof I have hereunto set my hand and seal this 29th day of August, 1891.

[SEAL.] LOUIS P. TREMP,
Register of Deeds.

(Endorsed on back:)
United States to Peck & Newcomb. Certificate No. 111.

47 REGISTER'S OFFICE,
Chippewa Co., Mich.

Received for record the 18th day of December, A. D. 1874, at 9 o'clock a. m., and recorded in Liber 5 of Deeds, on page 217.

GUY H. CARLETON, *Register.*

EXHIBIT 6—FIELD-NOTES.

STATE OF MICHIGAN:

State Land Office Official Certificate.

LANSING, *Aug. 26th*, 1891.

I, Geo. T. Shaffer, commissioner of the State land office, do hereby certify that the annexed is a true copy of the field-notes of private

claim No. 3, village of Sault Ste. Marie, surveyed by Thomas Whelpley.

That I have carefully compared the said copy with the original thereof now on file and of record in my office, and that it is a correct transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed. Done at the city of Lansing on the day and year above written.

[SEAL.] GEO. T. SHAFFER,
Commissioner of the State Land Office.

Town 47 north, range one west, Mich.

LAND OFFICE, *August 26th*, 1891.

Field-notes of United States Survey of Private Claim Number 3, Sault Ste. Marie, by Thomas Whelpley.

Claim number 3, Samuel Peck and Franklin Newcomb.

48 First part claim number 3 began at post number 1–3 cedar, 2 feet 9 inches long, 3½ inches by 2¾ inches, and one foot out of ground, west side Meridian street, 50 links north, 88 degrees 50 minutes west from quarter-section post, east side section 1, town 47 north, range 1 west; thence north along west side Meridian street 7 chains 87 links to post numbered 1–4 cedar, 2 feet 5 inches long, 2½ by 2¾ inches, 11 inches out of ground, northeast corner south side of Ridge street; north 88 degrees 50 minutes west along south side of Ridge street 5 chains 25 links, number on post 1–5 cedar, 2 feet 2 inches long, 2½ inches by 2½, 4 feet out of ground, right bank Ste. Marie river, northwest corner; south 36 degrees 43 minutes west along right bank Ste. Marie river 2 chains 36 links to post on river bank; north 65 degrees west along right bank river 2 chains to post on river bank; south 30 degrees east along right bank river 1 chain 50 links to post on river bank; south 22¾ degrees west along right bank river 5 chains 90 links, post numbered 1–2 cedar, 2 feet 7 inches long, 3 inches by 2½ inches, 4 feet out of ground, southwest corner; south 88 degrees 50 minutes east along south boundary 10 chains to post 1–3 cedar, 2 feet 9 inches long, 3½ by 2¾ inches, 1 foot out of ground, to place of beginning, containing 6.42 acres.

Claim number 3, Peck and Newcomb.

Second part claim number 3 began at post number 1–7 cedar, 2 feet 5 inches long, 2¾ inches by 3¼ inches, 6 inches out of ground, north side of Ridge street and west side Meridian street, 50 links north 88 degrees 50 minutes west from a point on the principal meridian of Michigan, 8 chains 87 links north of quarter-section post, east side section 1, town 47 north, range 1 west; thence north along west side Meridian street 4 chains 22 links to post number 1–8 cedar,

49 2 feet 4 inches long, 3¼ by 3½ inches, 5 inches out of ground, northeast corner, south side Canal street; south 85 degrees 23 minutes west along south side Canal street 3

chains 10 links to post number 1–9, white cedar, 2 feet 6 inches long, 2½ inches by 3½ inches, 6 inches out of ground, northwest corner, right bank River Ste. Marie; south 26 degrees 16 minutes west along right bank Ste. Marie, 4 chains 32 links to post number 1–6, white cedar, 2 feet 6 inches long, 2¾ by 3½ inches, 5 inches out of ground, north side of Ridge street, southwest corner; south 88 degrees 50 minutes east along north side Ridge street 5 chains to post number 1–7, white cedar, 2 feet 5 inches long, 2¾ by 3¼ inches, 6 inches out of ground to place of beginning, containing acres 0,09-100.

Claim number 3, Peck and Newcomb.

Third part claim number 3 began at post number 1–3–3, white cedar, 2 feet 3 inches long, 3 by 4 inches, 11 inches out of ground, standing at the intersection of the northerly boundary of the canal reservation and the principal meridian of Michigan, 20 chains and 22 links north from the quarter-section post, east side section 1, township 47 north, range 1 west; thence north along the meridian to right bank River Ste. Marie 90 chains to post numbered 1–3–5, white cedar, 2 feet 7 inches long, 3 inches by 2½ inches, whole spiked on east side of Morning Star house; south 61 degrees 43 minutes west along right bank of River Ste. Marie 2 chains 24 links to post numbered 1–3–4, white cedar, 2 feet 5 inches long, 3 inches by 3½ inches, 2 inches out of ground, southwest corner; north 85 degrees 23 minutes east along northerly boundary Canal reservation 1 chain 98 links to post numbered 1–3–3, white cedar, 2 feet 3 inches long, 3 inches by 4 inches, 11 inches out of ground, to place of beginning, containing acres 0,09-100.

50 Claim number 3, Peck and Newcomb.

Fourth part claim number 3, began at post number 1–3–3, white cedar, 2 feet 3 inches long, 3 inches by 4 inches, 11 inches out of ground, standing at the intersection of the northerly boundary of the canal reservation and the principal meridian of Michigan, 20 chains and 20 links north from the quarter-section post, west side section 6, town 47 north, range 1 east; thence north 85 degrees 23 minutes east, along the northerly boundary canal reservation, 9 chains 17 links to post number 1–3–6, white cedar, 2 feet 6 inches long, 2 inches by 2½ inches, 1 foot 4 inches out of ground, northeast corner; north 89 degrees west along the north boundary of claim number 3, 9 chains 17 links to post number 1–3–5, white cedar, 2 feet 7 inches long, 3 inches by 2½ inches, whole spiked on east side of the Morning Star grocery house, at intersection of meridian and right bank of River Ste. Marie; meridian north terminus; south along the meridian 90 chains to post number 1–3–3, cedar, 2 feet 3 inches by 3 feet 4 inches, 11 inches out of ground, to place of beginning, containing $\frac{41}{100}$ acres.

Claim number 3, Peck and Newcomb.

Fifth part claim number 3 began at post number 2–3, white cedar, 2 feet 5 inches long, 3 by 3¼ inches, 1 foot 1 inch out of ground,

north side Spruce street, link southwest corner and 50; south 88 degrees 50 minutes east of the quarter-section post on the principal meridian of Michigan, west side section 6, township 47 north, range 1 east; thence south 88 degrees 50 minutes east along north side Spruce street 8 chains 64 links to post number 2–4, white
51 cedar 2 feet 6 inches long, 2¼ by 3¼ inches, 1 foot out of ground, southeast corner; north along east side claim 3 to south side Ridge street 7 chains 87 links to post number 2–5, white cedar, 2 feet 7 inches long, 3 inches by 2¼ inches, 1 foot 3 inches out of ground, northeast corner; north 88 degrees 50 minutes west along south side Ridge street to east side Meridian street 8 chains 64 links to post number 2–2, white cedar, 2 feet 6 inches long, 3¼ by 3¼ inches, 9 inches out of ground, northwest corner; south along east side Meridian street 7 chains 87 links to post number 2–3, white cedar, 2 feet 5 inches long, 3 inches by 3¼ inches, 1 foot 1 inch out of ground, to place of beginning, containing 6.80 acres.

Claim number 3, Peck and Newcomb.

Sixth part claim number 3 began at post number 2–1, white cedar, 2 feet 3 inches long, 2½ inches by 2½ inches, 1 foot out of ground, north side Ridge street, southwest corner and 50 links; south 88 degrees 50 minutes east of a point on the principal meridian of Michigan 8 chains 87 links north from the quarter-section post on the meridian, west side section 6, town 47 north, range 1 east; thence south 88 degrees 50 minutes east along north side Ridge street 8 chains and 64 links to a post number 2–6, white cedar, 2 feet 4 inches long 2¾ by 3¼ inches, 1 foot out of ground, southeast corner; north along the east side claim 3 to south side Canal street 5 chains 18 links to post number 2–7, white cedar, 2 feet 4 inches long, 2¼ by 3¼ inches, 9 inches out of ground, northeast corner; north 85 degrees 23 minutes west along southerly side Canal street to east side Meridian street 8 chains 67 links to post number 2–0, white cedar, 2 feet
52 3 inches long, 2½ inches by 2¾ inches, 8 inches out of ground. This post is set 24 links south 85 degrees 23 minutes west from the corner, on the west side of a house standing on the corner; south along the east side of Meridian street 4 chains 30 links to a post number 2–1, white cedar, 2 feet 3 inches long, 2½ by 2½ inches, 1 foot out of ground, to place of beginning, containing acres 4.095. Whole claim containing acres 19.45.

53 *Præcipe for Writ of Error.*

STATE OF MICHIGAN:

In the Supreme Court.

GILMORE G. SCRANTON, Plaintiff and Appellant,
vs.
EBEN S. WHEELER, Defendant and Appellee.

Charles C. Hopkins, clerk supreme court.

SIR: Please issue a writ of error in the above-entitled cause in favor of the plaintiff, directed to the judge of the circuit court for

the county of Chippewa, and returnable December 15, 1896; action of ejectment.

Enclosed find clerk's fee of six dollars.

Yours, etc.,

HARLOW P. DAVOCK,
JOHN C. DONNELLY,
Attorneys for Plaintiff and Appellant.

Dated November 16, 1896.

(Endorsed:) Filed Nov. 17, 1898. Chas. C. Hopkins, clerk.

54 *Writ of Error.*

The People of the State of Michigan to the judge of our circuit court in and for the county of Chippewa, Greeting:

Because in the record and proceedings and also in the giving of judgment in a plaint which was in our said circuit court, before you, between Gilmore G. Scranton, plaintiff, and Eben S. Wheeler, defendant, in a plea of ejectment, manifest error hath intervened, to the great damage of the said plaintiff, as by his complaint we are informed, we, being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid and in this behalf, do command you that if judgment be thereupon given, then you send to our supreme court, distinctly and openly, under your seal, the record and proceedings of the plaint aforesaid, together with all things concerning the same and this writ, so that our said court may have them at the supreme court room, in the capitol, in the city of Lansing, on the fifteenth day of December next, that, the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error what of right and according to the law and custom of the State of Michigan ought to be done.

Seal Supreme Court of Michigan.

Witness the Honorable Charles D. Long, chief justice of our supreme court, at Lansing, this seventeenth day of November, in the year of our Lord one thousand eight hundred and ninety-six.

CHAS. C. HOPKINS,
Clerk of the Supreme Court.

To the supreme court of the State of Michigan:

The execution of the within writ appears by the transcript of record hereto annexed.

February 18, 1897.

[Seal Circuit Court, Chippewa Co.]

WILLIAM M. SNELL,
Clerk of the Circuit Court for the County of —.

Endorsed: Filed Feb. 26, 1897. Chas. C. Hopkins, clerk supreme court.

55 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the ninth day of April, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Charles D. Long, chief justice; Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, Joseph B. Moore, associate justices.

GILMORE G. SCRANTON, Plaintiff and Appellant,
vs.
EBEN S. WHEELER, Defendant.

This cause, coming on to be heard, is argued by Messrs. Davock and Donnelly, for plaintiff, and by Mr. Power, for defendant, and submitted.

56 *Opinion.*

Supreme Court of Michigan.

GILMORE G. SCRANTON
vs.
EBEN S. WHEELER.

This case originated in the circuit court of the county of Chippewa in May, 1891, to recover possession of the following-described parcel of land: "An undivided one-half interest or portion of, in, and to private land claim number 3, Whelply's survey, in the village of Sault Ste. Marie, Michigan, including therein that portion of the land beneath the water of St. Mary's river from the river bank on said lot to the thread of the stream of said river, which forms a part of said lot, and all riparian rights belonging and attached thereto and being a part thereof, which said premises the plaintiff claims in fee." The defendant was then the superintendent of the Ste. Marie's Falls canal, under the authority of the United States Government. After issue was joined a petition was filed by the defendant for the removal of the cause to the Federal court, for the reasons (1) that defendant was in possession for the United States, as superintendent of the canal, and that the United States was the real party in interest; (2) that the suit arose under the laws of the United States. Thereupon the suit was removed, and was tried in the circuit court of the United States for the western district of Michigan, September 14, 1892, resulting in a judgment for the defendant. The case was then removed by a writ of error to the United States court of appeals, and there affirmed. 6 C. C. A., 585; 57 Fed., 803. It was then appealed to the Supreme Court of the United States, and dismissed from that court, and remanded to the State court for trial, for the reason that the pleadings did not show any Federal jurisdiction. Thereupon trial was had in the State court, resulting in a judgment for the defendant, and the case is now in this court on a writ of error. The learned circuit judge directed a verdict for the defendant upon the ground that the judgment against the defendant, Wheeler,

would in effect be a judgment against the United States and their property. In this the court was in error. When one in the actual possession of property defends his right of possession upon the ground that the government, State or national, has placed him in possession, he must show that the right of the government is paramount to the right of the plaintiff, or judgment will go against him. This point has been settled by the decision of the Supreme Court of the United States rendered May 10, 1897. Tindal *v.* Wesley, 17 Sup. Ct., 770. In that case the authorities upon this point are reviewed at length, including the case of Stanley *v.* Schwalby, 162 U. S., 255; 16 Sup. Ct., 754, upon which defendant mainly relies.

2. The United States Government took possession of the submerged land of the plaintiff for the purpose of erecting thereon piers in aid of the immense navigation upon the Great Lakes and the rivers connecting them. That the improvements made were necessary to aid and protect this navigation is established beyond dispute. Had the Government the right to make these improvements upon the submerged land without compensation to the adjoining owner? It is conceded that under the law of Michigan the title to sub-
57 merged land is in the adjoining owner to the thread of the stream. It is insisted in behalf of the plaintiff that the Government possess no right to so use his land, although submerged, and although necessary to so use it in aid of navigation, as to cut off his access to the open water. It is contended on the other hand that this title to submerged lands along navigable waters, and the right of access thereto, are subject to the paramount right of the United States to use this land in such manner as they shall determine to be necessary in aid of navigation. The court of appeals was unanimous in its opinion against the plaintiff's claim. In a very able opinion delivered by Judge Lurton the facts are clearly stated, the authorities cited, and we think the conclusion there reached is the correct one. We therefore deem it unnecessary for us to enter into a long discussion of the law and the authorities. The case of Hawkins' Point lighthouse, 39 Fed., 77, appears to be exactly in point, and to rule the present case. We think the conclusion reached by the court below was a correct one, although it gave a wrong reason. The judgment is affirmed.

C. B. GRANT.
R. M. MONTGOMERY.
J. B. MOORE.
FRANK A. HOOKER.
CHAS. D. LONG.

Endorsed: Filed July 13, 1897. Chas. C. Hopkins, clerk supreme court.

58 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the thirteenth day of July, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Charles D. Long, chief justice; Claudius

B. Grant, Robert M. Montgomery, Frank A. Hooker, Joseph B. Moore, associate justices.

GILMORE G. SCRANTON, Plaintiff and Appellant,
vs.
EBEN S. WHEELER, Defendant.

The record and proceedings in this cause having been removed to this court by writ of error issued to the circuit court for the county of Chippewa, and the same and the matters in error assigned having been seen and inspected and duly considered by the court, and it appearing to this court that in said record and proceedings and in the giving of judgment in said circuit court there is no error, therefore it is ordered and adjudged that the judgment of said circuit court for the county of Chippewa be, and the same is hereby, in all things affirmed, and that the defendant do recover of the plaintiff his costs, to be taxed, and that he have execution therefor.

59 *Petition.*

To the Honorable Claudius B. Grant, chief justice of the supreme court of the State of Michigan:

The petition of Gilmore G. Scranton respectfully represents:

1. That he is a plaintiff in a cause commenced in the circuit court for the county of Chippewa, in this State, against Eben S. Wheeler, defendant in an action of ejectment, which said cause proceeded to final judgment in said circuit court in favor of said defendant, and was thereupon afterwards removed to the supreme court of this State by writ of error sued out by your petitioner, said supreme court of the State of Michigan being the final court of appeal and review in this State.

2. That the right claimed by said plaintiff was the recovery of the possession of certain land owned by him, from the possession of which he was ousted by the defendant, said ouster consisting of the taking and holding possession by the said defendant of certain of the submerged lands belonging to the plaintiff in the St. Mary's river in said county of Chippewa, said defendant claiming to be in the possession thereof as the agent of the United States, and that they were taken possession of for the purpose of extending the canal around the rapids in the St. Mary's river, and for the improvement of the navigation thereof, and said defendant claiming that the United States had the right and authority to take possession of said lands of said plaintiff without giving him any compensation therefor, and the said plaintiff claiming that the act of the said defendant and of the said United States was in contravention of the provision of the Federal Constitution prohibiting the taking of any private property for public use without due compensation.

60 3. That said cause was duly heard in said supreme court on said writ of error, and the decision and judgment of said circuit court for the county of Chippewa was affirmed.

Therefore your petition prays that you endorse hereon, or on the writ of error hereto attached, an order allowing the issuing of a writ of error to remove the record of said cause to the Supreme Court of the United States for review, in accordance with the provisions of the revised Constitution of the United States, and that a citation may issue over your signature, directed to said defendant as required by rule, and that the bond herewith tendered may be duly approved; and your petitioner will ever pray.

GILMORE G. SCRANTON,
By JOHN C. DONNELLY,
One of His Attorneys.

JOHN C. DONNELLY &
HARLOW P. DAVOCK,
Attorneys for Petitioner.

61 Know all men by these presents that we, Gilmore G. Scranton, of the city of Sault Ste. Marie, Michigan, as principal, and Elmer S. B. Sutton and Victor E. Metzger, of the same place, as sureties, are held and firmly bound unto Eben S. Wheeler, of same place, in the full and just sum of five hundred dollars, to be paid to the said Eben S. Wheeler, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this second day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a supreme court of the State of Michigan, in a suit depending in said court between Gilmore G. Scranton, plaintiff, and Eben S. Wheeler, defendant, a judgment was rendered against the said Gilmore G. Scranton, and the said Gilmore G. Scranton having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Eben S. Wheeler, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Gilmore G. Scranton shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

GILMORE G. SCRANTON. [SEAL.]
ELMER S. B. SUTTON. [SEAL.]
VICTOR E. METZGER. [SEAL.]

Sealed and delivered in presence of—
WILFRED T. RAINS.
L. H. AUSTIN.

62 WESTERN DISTRICT OF MICHIGAN, *ss:*

Personally appeared before me Elmer S. B. Sutton and Victor E. Metzger, in said district, and each made oath that each is worth the

sum of one thousand dollars after payment of his just debts in real estate subject to execution within said district.

ELMER S. B. SUTTON.
VICTOR E. METZGER.

Subscribed and sworn to before me this 2nd day of February, 1898.

[SEAL.] JNO. A. COLWELL,
U. S. Commissioner.

Approved by—
C. B. GRANT,
Chief Justice of the Supreme Court of the State of Michigan.

(Endorsed:) Filed Feb. 21, 1898. Chas. C. Hopkins, clerk supreme court.

63 Supreme Court of the United States.

GILMORE G. SCRANTON, Plaintiff in Error,
vs.
EBEN S. WHEELER, Defendant in Error. } Assignment of Errors.

And now comes the said plaintiff in error and says that the supreme court of the State of Michigan was in error in its judgment in said cause as follows, to wit:

1. The said supreme court erred in affirming the judgment of the circuit court for the county of Chippewa in said cause in favor of defendant in error and against plaintiff in error.

2. Said supreme court of the State of Michigan erred in holding and deciding — said cause that the plaintiff in error was not entitled to recover against the said defendant in error the possession of the lands in controversy in said cause.

3. The said supreme court erred in its judgment in said cause in holding and deciding that the defendant in error was lawfully in possession of the lands in controversy under and by virtue of the power of the Federal Government to improve the navigability of public streams and rivers, and that the United States Government, in the exercise of that power, had the lawful right to take possession of the submerged lands of the said plaintiff in error without making him any compensation therefor, and to keep and use the same for the improvement of the navigability of the St. Mary's river and the extension of the canal around the falls of St. Mary without giving the said plaintiff in error due compensation therefor.

64 4. Said supreme court of the State of Michigan erred in holding and deciding that the plaintiff in error was not entitled as against the defendant in error to the protection of the provision of the Federal Constitution, to wit, article 5 of the amendments to the Constitution of the United States, which prohibits the taking of private property for public use without just compensation.

5. The said supreme court of the State of Michigan erred in affirming and approving the action of the circuit court for the county of Chippewa in refusing to charge the jury, as requested by the said plaintiff in error, as follows:

"That under the law of this State applicable to the facts in this case the plaintiff is the owner of the submerged land in front of his upland, bounded by lines extending from the lateral lines of his upland to the center file of the stream and running at right angles with the course of the stream in front of the upland, and I therefore charge you that the land and property described in plaintiff's declaration belongs to and is owned by the plaintiff in fee-simple as claimed by him and so belonged to him when this action was brought.

That the pier or structure in question as shown by the testimony was constructed and is now maintained by the defendant across the plaintiff's land without his consent and against his rights in the premises.

That neither the defendant nor the United States had any lawful right to construct said pier on and across the premises in question, thus taking possession of the premises adversely to the plaintiff and excluding the plaintiff from enjoyment thereof and from all access from his said land and premises to the navigable water of the river in front thereof and from the navigable water of the said
65 river to his land.

That neither the Government of the United States nor the defendant had any lawful right to so construct said pier or to maintain the same as was being done at the time this suit was brought and as they are now doing without their first having acquired the right to so construct and maintain the same from the owner of the fee or of having obtained the right therefor by proceedings under the power of eminent domain on payment of due compensation to the owner of the land therefor.

That under article V of amendments to the Constitution of the United States the property of the plaintiff, the property in question being the private property of the plaintiff, could not be lawfully taken for the public use to which it was appropriated without just compensation having been made therefor to the owner or without due process of law.

And the jury are instructed that the construction of this pier was in violation of said article V of the amendments to the Constitution of the United States in this, that it appears from the testimony in the case that the same was appropriated without due process of law, and the same was taken and devoted to a public use without the consent of the owner thereof and without just compensation therefor, and that the taking possession of the land of the plaintiff, as appears by the record, was in violation of said article V, and that the taking possession of the land of the plaintiff and the construction of the pier thereon in the manner shown in this case, the effect of which was to deprive him of all egress from his said land to the navigable stream, and to prevent him using his said

property by passing over or across said pier, as shown in the
66 testimony of the case, was in violation of said article V of amendments to the Constitution of the United States and as depriving the owner thereof of his property without due process of law and without just compensation and without his consent."

6. Said supreme court of the State of Michigan erred in affirming and approving the action of the circuit court for the county of Chippewa in refusing to direct a verdict in favor of plaintiff in error and in directing a verdict in favor of defendant in error. Therefore he prays that the judgment of the supreme court of the State of Michigan may be reversed, and that said court be directed to reverse the judgment of the circuit court for the county of Chippewa in accordance with the rights of the parties.

JOHN C. DONNELLY &
HARLOW P. DAVOCK,
Attorneys for Plaintiff in Error.

Filed Feb. 18, 1898.

CHAS. C. HOPKINS,
Clerk Supreme Court of Michigan.

67 In the Supreme Court.

GILMORE G. SCRANTON
vs.
EBEN S. WHEELER.

On this cause, on reading the petition of the said Gilmore G. Scranton, praying that a writ of error may be allowed to issue in the above-entitled cause to remove the same to the Supreme Court of the United States for review, which said petition is accompanied by a satisfactory bond as required by the statute and the rule in such case made and provided, and also by an assignment of errors, it is ordered that a writ of error in accordance with the prayer of said petition be, and the same is hereby, allowed.

C. B. GRANT,
Chief Justice of the Supreme Court of Michigan.

68 UNITED STATES OF AMERICA, *ss:*

To Eben S. Wheeler, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Michigan, wherein Gilmore G. Scranton is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Claudius B. Grant, chief justice of the supreme court of the State of Michigan, this eighteenth day of

February, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal of the Supreme Court of Michigan, Lansing.]

C. B. GRANT,
Chief Justice of the Supreme Court of the State of Michigan.

[Endorsed:] Original. 15918. Filed March 9, 1898. Chas. C. Hopkins, clerk.

I hereby accept service of a true copy of the within citation. Feb'y 26, 1898.

L. G. PALMER,
Att'y for Def'd't.

69 UNITED STATES OF AMERICA, *ss:*

To Eben S. Wheeler, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Michigan, wherein Gilmore G. Scranton is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Claudius B. Grant, chief justice of the supreme court of the State of Michigan, this eighteenth day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal of the Supreme Court of Michigan, Lansing.]

C. B. GRANT,
Chief Justice of the Supreme Court of the State of Michigan.

[Endorsed:] Original. 15918. Filed March 9, 1898. Chas. C. Hopkins, clerk.

I hereby accept service of a true copy of the within citation. Feb'y 26, 1898.

JOHN POWER,
Att'y for Def't.

70 STATE OF MICHIGAN:

Supreme Court.

GILMORE G. SCRANTON, Plaintiff in Error,
vs.
EBEN S. WHEELER, Defendant in Error.

To the supreme court of the State of Michigan:

Your petitioner, Harlow P. Davock, respectfully shows to this court that he is the attorney for Gilmore G. Scranton, the plaintiff in the above-entitled cause.

Your petitioner further shows that a judgment has been rendered in this court affirming the judgment of the court below in favor of the defendant in this cause.

Your petitioner further shows that upon application to the Supreme Court of the United States a writ of error and citation has been issued out of the Supreme Court of the United States in the above-entitled cause, and the same is returnable thirty days after the 18th day of February, A. D. 1898.

Your petitioner further shows that it is necessary that certain original papers should be inspected in the Supreme Court of the United States upon such writ of error; that said original papers consist of certain maps included in Exhibits A and one to ten, inclusive, and he prays that the same may be returned with said writ of error, and that this court may make such rule or order for the safekeeping, transportation, and return of such original papers as to them it may seem proper and meet.

And your petitioner will ever pray.

HARLOW P. DAVOCK.

STATE OF MICHIGAN, } ss:
County of Wayne, }

On this 25th day of February, A. D. 1898, before me personally came the above-named Harlow P. Davock and made oath that he has read the foregoing petition by him subscribed and
71 knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those he believes it to be true.

RICHARD G. KIRCHNER,
Notary Public, Wayne County, Michigan.

Endorsed: Filed February 25, 1898. Chas. C. Hopkins, clerk supreme court.

72 STATE OF MICHIGAN:

Supreme Court.

GILMORE G. SCRANTON, Plaintiff in Error,
vs.
EBEN S. WHEELER, Defendant in Error.

In error to the circuit court for the county of Chippewa.

Suit pending in the supreme court for the State of Michigan, at Lansing, on the 18th day of February, A. D. 1898.

In this cause, on reading the petition of Harlow P. Davock, attorney for the plaintiff in error in said cause, praying that certain exhibits may be returned to the Supreme Court of the United States, together with the writ of error issued out of said supreme court in said cause, it is ordered that the certain original maps used in said cause, to wit:

Exhibit 1, tracing Carlton map, entrance to canal;
Exhibit 2, blue print, Jeff. Davis map of canal;
Exhibit 4, tracing and large scale showing P. C. 3 and old canal entrance;
Exhibit 5, tracing in large scale showing P. C. 3 and new canal entrance;
Exhibit 7, lake survey chart of 1857;
Exhibit 8, lake survey chart down to September, 1891;
Exhibit 9, blue print of Whelpley survey;
Exhibit 10, blue print of J. B. Davis map;
Exhibit A, blue print of Gen. Weitzel's map, 1876;
be transported and returned, together with the writ of error in said cause, to the Supreme Court of the United States, and after the determination of said cause be returned to the circuit court for the county of Chippewa, that being the court in which said exhibits were originally introduced.

C. B. GRANT, *Chief Justice.*

73	Gilmore G. Scranton, plaintiff and appellant, *vs.* Eben S. Wheeler, defendant.	Harlow P. Davock. John C. Donnelly. Error to Chippewa.	Lewis G. Palmer. John Power. Steere, J.

Journal.	Date.	Proceedings.
	1896.	
	Nov. 17	Precipe filed and writ issued, returnable December 15, 1896.
	" 20	Proof of notice of writ filed.
	1897.	
	Feb. 18	Note of argument filed.
	" 26	Return filed.
	" "	Exhibits filed.
	Mar. 2	Note of argument filed.
O 15	Apr. 9	Argued and submitted.
" 194	Jul- 13	Affirmed with costs.
	1898.	
	Feb. 18	Writ of error allowed and filed.
	" "	Assignment of errors in Supreme Court U. S. filed.
	" 21	Bond filed.
	Mar. 9	Citations with acceptance of service filed.
	Feb. 25	Petition of H. P. Davock as to exhibits filed.
	" "	Order of Grant, C. J., as to exhibits filed.
	Mar. 9	Stipulations as to original exhibits and drawings filed.
	" 12	Return forward to Supreme Court U. S.

74 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the

said State in which a decision could be had in the said suit between Gilmore G. Scranton, plaintiff, and Eben S. Wheeler, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or
75 statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal of the Circuit Court, Eastern District of Michigan.]

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States
for the Eastern District of Michigan.

Allowed by—

C. B. GRANT,
Chief Justice Supreme Court of Michigan.

[Endorsed:] Filed Feb. 18, 1898. Chas. C. Hopkins, clerk supreme court.

76 Supreme Court of the State of Michigan.

GILMORE G. SCRANTON, Plaintiff in Error,
vs.
EBEN S. WHEELER, Defendant in Error.

STATE OF MICHIGAN:

In the Supreme Court, *ss:*

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and entered in the above-entitled cause by said court, including the written decision and reasons therefor, signed by the judges of said court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original and it is a true transcript therefrom and of the whole thereof; that attached thereto are the writ of error, with allowance endorsed thereon; the citations, with acknowledgement of service endorsed thereon; a copy of the bond to the adverse party filed with the writ of error, and the assignment of errors in the Supreme Court of the United States.

Seal of the Supreme Court of Michigan, Lansing.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this 12th day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: Case No. 16,825. Michigan supreme court. Term No., 262. Gilmore G. Scranton, plaintiff in error, *vs.* Eben S. Wheeler. Filed March 16, 1898.

No. 262. 49
FEB 27 1899
JAMES H. McKENNEY,
Clerk.
135
Brief of Davock & Donnelly for P. in E.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

Filed Feb. 27, 1899.

MORE G. SCRANTON,
Plaintiff in Error,

vs. No. 262.

EN S. WHEELER,
Defendant in Error.

In Error to the Supreme Court of Michigan.

BRIEF FOR PLAINTIFF IN ERROR.

HARLOW P. DAVOCK,
JOHN C. DONNELLY,
Counsel for Plaintiff in Error.

DETROIT:
Belford Printing Co., Steam Printing House, 11 and 13 Lafayette Ave.
1899.

SUPREME COURT OF THE UNITED STATES.

GILMORE G. SCRANTON,
Plaintiff in Error,

vs.

EBEN S. WHEELER,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This case was originally begun in the Circuit Court for the County of Chippewa, State of Michigan. It was removed to the United States Circuit Court for the Western District of Michigan, taken up on error to the Circuit Court of Appeals, and thence to the Supreme Court, where it was held that the suit had been improperly removed to the Federal Courts and remanded it to the Circuit Court for the County of Chippewa. The case was there tried and judgment entered for the defendant. On a writ of error the case was taken to the Supreme Court of the State of Michigan, where the judgment of the Circuit Court was affirmed. A writ of error to the Supreme Court of Michigan brings the case before this court.

The plaintiff filed his declaration in ejectment alleging that he was the owner in fee of an undivided one-half interest in a certain lot in the village of Sault Ste. Marie, and also that portion of the land beneath the water of St.

Mary's river, from the river bank on said lot to the thread of the stream, forming a part of said lot, and all riparian rights belonging and attached thereto and being a part thereof; that he was entitled to the possession thereof and that the defendant unlawfully withholds such possession from him. (Rec., p. 2-3.)

The defendant plead the general issue. (Rec., p. 1.)

Upon the trial the following facts, in brief, appeared from the evidence:

The plaintiff was the owner in fee of an undivided half of private claim No. 3, in the village of Sault Ste. Marie, Chippewa County, Michigan, according to the survey or plat of said village, made by Thomas Whelpley, pursuant to a certain act of Congress. (Rec., p. 4.)*

The land in question was confirmed under the provisions of that act to the heirs of Franklin Newcomb and one Peck jointly. (For deed from United States, see Exhibit "3," Rec., p. 27.) The act of Congress, entitled "An act providing for the examination and settlement of claims for land at the Sault Ste. Marie, in Michigan," in accordance with which the Whelpley survey was made, was approved September 26, 1850. The claim of Peck and Newcomb's heirs to the land in question was confirmed agreeably to the provisions of that act, September 4th, 1855. The plaintiff derived his title through mesne conveyances from the heirs of Newcomb. (Rec., p. 5.)

In 1852 the United States, by an act of Congress, granted to the State of Michigan the right to construct a ship canal around the falls of St. Mary's, including within such grant the donation of the right of way and certain

*A copy of said Whelpley survey was introduced and marked Exhibit Nine—line of new pier being since added. This exhibit, together with others marked Exhibits 1, 2, 4, 5, 7, 8, 9, 10, and A, are on file with the clerk of this court, having been returned together with the writ of error, from the Supreme Court of Michigan in accordance with an order of that court. (See p. 41, Rec.)

public lands for the purpose. Exhibit "2" (on file with the clerk of this court) is the plat of the survey of the proposed route of said canal, referred to in sections 1 and 6 of the act of Congress above mentioned. (Rec., p. 5.)

Under the authority granted to the State of Michigan, the canal was begun in 1853 and completed in 1855. As originally constructed the south pier of the canal extended across a portion of the front of plaintiff's lot, leaving, however, between his riparian lines as projected at right angles to the center of the stream, a gap of three or four hundred feet, through which access could be had from plaintiff's land to navigable water and vice versa. (Rec., p. 6.) The original south pier of the canal extended from the point where the canal emerged from the dry land, out through shallow water into deep water, extending across a portion of the front of plaintiff's lot, but "taking a turn to the northward into deep water." This pier as originally built remained until the change complained of was made, in 1877.

The rapids or falls in the St. Mary's river begin east of where plaintiff's easterly lateral line would strike deep water, if projected as plaintiff claims it should be; and the river proper in front of plaintiff's land and across his riparian front is naturally deep enough for navigation. Before the construction of the canal and in fact after the construction of the original pier and before the new one was built, deep water was always acessible from plaintiff's land and vice versa, without going beyond the lateral lines of plaintiff's lot, projected.

In 1877, in accordance with the recommendation of a corps of engineers made to the Secretary of War, and approved by him, the canal was partially reconstructed, extended and straightened, and a new pier built. Exhibit "A" (on file with the clerk) is a map of the proposed new

pier, showing its location, and conformably with which map the pier was constructed. (Rec., p. 6.)* In 1881 the new work was completed (Rec., p. 5) and in that year the State of Michigan transferred all its rights to the canal to the United States.

The effect of the construction of the new pier is to cut off entirely plaintiff's access from his land to navigable water, and vice versa, within its riparian lines as projected (see Exhibit "1"), and on both sides of the space between such projected lines of plaintiff's riparian property, and between the river bank and the pier, the water is only five feet deep. So that by the erection and maintenance of the pier in question the plaintiff is prevented from reaching water of any greater depth than five feet.

The plaintiff attempted to land a cargo on said pier, and thus convey it to his lot, but was prevented from doing so and driven off by the defendant, who claimed the exclusive right thereto for the United States. The defendant Wheeler was the superintendent of the canal, including the new south pier, employed by the United States and in possession of the same on behalf of the United States. He was in possession under such authority, and under such claim prior to and at the time of the commencement of this suit, and continued so up to the time of trial. (Rec., p. 5.)

The western extremity of the canal ended in two piers running out from the land into deep water, in a curve to the northward. The new south pier took a different direction, diverging from the northward curve of the old south pier at a point four hundred and fifty feet from the shore, and running in practically a straight line; direction, a little south of west. (Rec., p. 10.) This brought the western end of the new south pier one hundred feet nearer

*This new pier is marked on some of the exhibits "New South Pier."

shore than the corresponding point on the old south pier. The new pier, instead of running out to deep water as the old one did, was built in water which was naturally about five feet in depth. The new pier is about twelve hundred feet longer than the one which was originally built. The water lying between the line of the old pier and the line of the new one, was about five feet deep. (Rec., pp. 9, 10.) It was necessary to dredge this portion of the bed in order to make an artificial channel, and the pier as now built cuts off the plaintiff from all access to navigable water, as it crosses the riparian front of plaintiff's lot completely, and there is no way of reaching navigable water except by crossing the pier in question. (Rec., pp. 12, 16, 19.)

This is the substance of the testimony. The material facts were not in dispute and the errors assigned and relied on are the rulings of the court on matters of law. The learned Circuit Judge directed a verdict for the defendant on the ground that the action, if it resulted in a verdict in favor of the plaintiff, would necessarily result in a judgment against the United States, and it could not therefore be maintained.

In the Supreme Court the judgment was affirmed, the Court, however, holding that the Circuit Judge had arrived at the right result although by wrong reasoning. The decision in the Supreme Court was that the action was properly brought against the defendant individually and that a judgment against him would not be a judgment against the United States, and would stand; but that the plaintiff was not entitled to recover for the reason that the federal government had acted properly in appropriating the plaintiff's submerged land, and that, therefore, he was not entitled to compensation.

Plaintiff claims that although the federal government may appropriate his submerged land for a proper purpose without compensation, it cannot do so in this case,

because something further than the submerged land has been taken, i. e., his right of access to navigable water from the land, and to his land from navigable water. This, it is contended, is a valuable property right, inhereing in him as the owner of the upland or more correctly appertaining to the upland itself, forming a part thereof, and no more subservient to the right of Congress to appropriate property under the commerce clause of the constitution than is the upland itself. This plaintiff claims on the contrary that his right of access above referred to is a valuable property right and if taken for any purpose, it must be upon the payment of compensation. That by the judgment of the Circuit Court, as affirmed by the Supreme Court, he is deprived of his property in violation of the guaranties contained in article 5 of the amendments to the Constitution of the United States.

ASSIGNMENT OF ERRORS.

The first two assignments of error are alike in that they object generally to the affirmance of the judgment of the Circuit Court. (Rec., p. 37.)

The third assignment of error is that the Supreme Court erred in deciding that the federal government was lawfully in possession of the lands in controversy by virtue of its power to improve the navigability of rivers and streams and in holding that the federal government had the lawful right to take possession of the submerged lands of the plaintiff in error without making compensation therefor, and to keep and use the same for the improvement of the river and the extension of the canal around the river without giving plaintiff in error due compensation.

The 4th assignment of error complains that the Supreme Court erred in holding that plaintiff was not being

deprived of his property under the 5th amendment to the federal Constitution.

The 5th assignment of error is as follows: The said Supreme Court of the State of Michigan, erred in affirming and approving the action of the Circuit Court for the County of Chippewa in refusing to charge the jury, as requested by the said plaintiff in error, as follows:

"That under the law of this State applicable to the facts in this case the plaintiff is the owner of the submerged land in front of his upland, bounded by lines extending from the lateral lines of his upland to the center file of the stream and running at right angles with the course of the stream in front of the upland, and I therefore charge you that the land and property described in plaintiff's declaration belongs to and is owned by the plaintiff in fee-simple as claimed by him and so belonged to him when this action was brought.

That the pier or structure in question as shown by the testimony was constructed and is now maintained by the defendant across the plaintiff's land without his consent and against his rights in the premises.

That neither the defendant nor the United States had any lawful right to construct said pier on and across the premises in question, thus taking possession of the premises adversely to the plaintiff and excluding the plaintiff from enjoyment thereof and from all access from his said land and premises to the navigable water of the river in front thereof and from the navigable water of the said river to his land.

That neither the Government of the United States nor the defendant had any lawful right to so construct said pier or to maintain the same as was being done at the time this suit was brought and as they are now doing without their first having acquired the right to so construct and maintain the same from the owner of the fee or of having

obtained the right thereof by proceedings under the power of eminent domain on payment of due compensation to the owner of the land therefor.

That under article V of amendments to the Constitution of the United States the property of the plaintiff, the property in question being the private property of the plaintiff, could not be lawfully taken for the public use to which it was appropriated without just compensation having been made therefor to the owner or without due process of law.

And the jury are instructed that the construction of this pier was in violation of said article V of the amendments to the Constitution of the United States in this, that it appears from the testimony in the case that the same was appropriated without due process of law, and the same was taken and devoted to a public use without the consent of the owner thereof and without just compensation therefor, and that the taking possession of the land of the plaintiff, as appears by the record, was in violation of said article V, and that the taking possession of the land of the plaintiff and the construction of the pier thereon in the manner shown in this case, the effect of which was to deprive him of all egress from his said land to the navigable stream, and to prevent him using his said property by passing over or across said pier, as shown in the testimony of the case, was in violation of said article V of amendments to the Constitution of the United States and as depriving the owner thereof of his property without due process of law and without just compensation and without his consent."

The 6th assignment of error sets up that the Supreme Court erred in affirming the action of the Circuit Court in its refusal to direct a verdict for plaintiff in error and in directing a verdict for defendant in error.

ARGUMENT.

The main question presented here is whether Congress under the exercise of its power to regulate commerce, can entirely cut off the access of a riparian proprietor from his land to the water and from the water to his land. There is no doubt that Congress, in the exercise of this power, may appropriate submerged land, and the shore.*

It has been held in numerous cases that navigable waters and the soil beneath them are under the control of the Federal Government, for the purpose of improving and regulating commerce and navigation. Our theory of the present case is not inconsistent with that doctrine, and to avoid misapprehension we will state at this point that we concede that to be the law. It is not claimed here that compensation must be made for the appropriation of submerged lands, but that Congress has no power to cut off the plaintiff from his access to and from the navigable water in front of his land without compensation. We contend that the right of access of a riparian owner is a property right which cannot be destroyed nor appropriated by Congress under the commerce clause of the Federal Constitution, except in accordance with the provisions of the 5th Amendment.

There are many cases where damages have been sought by the owners of submerged lands because of the appropriation thereof, but without avail. There are many other cases where litigants have conceived themselves aggrieved by the appropriation of submerged lands not their own,

---

*By "shore" is meant the land between high and low water mark.

Hale's, De Jure Maris.
Shively vs. Bowlby, 152 U. S., 1.

The charge of the Circuit Court to the jury is set forth at large on pages 21 to 26 of the record. The opinion of the Supreme Court appears on pages 33 and 34 of the record.

The main question presented here is whether Congress under the exercise of its power to regulate commerce, can entirely cut off the access of a riparian proprietor from his land to the water and from the water to his land. There is no doubt that Congress, in the exercise of this power, may appropriate submerged land, and the shore.*

It has been held in numerous cases that navigable waters and the soil beneath them are under the control of the Federal Government, for the purpose of improving and regulating commerce and navigation. Our theory of the present case is not inconsistent with that doctrine, and to avoid misapprehension we will state at this point that we concede that to be the law. It is not claimed here that compensation must be made for the appropriation of submerged lands, but that Congress has no power to cut off the plaintiff from his access to and from the navigable water in front of his land without compensation. We contend that the right of access of a riparian owner is a property right which cannot be destroyed nor appropriated by Congress under the commerce clause of the Federal Constitution, except in accordance with the provisions of the 5th Amendment.

There are many cases where damages have been sought by the owners of submerged lands because of the appropriation thereof, but without avail. There are many other cases where litigants have conceived themselves aggrieved by the appropriation of submerged lands not their own,

---

*By "shore" is meant the land between high and low water mark.

Hale's, De Jure Maris.

Shively vs. Bowlby, 152 U. S., 1.

but because of their ownership of riparian property in the vicinity, higher up or lower down the stream, they have suffered loss. In both of these cases damages have been uniformly denied, though on different grounds.

When the submerged land is taken, no compensation need be paid; not, however, on the ground that it is not property, nor on the ground that it has no value; but for the reason that the private owner has only a qualified title to it. His title is subject to the right of Congress to appropriate it. Congress, therefore, does not deprive the owner of his property, because the land for this purpose is not his. Congress, on the other hand, simply takes what it already owns, and not what belongs to someone else. Again, when Congress places an obstruction in a stream for the improvement of commerce, such as a pier, or a light-house, some persons owning adjacent property forming the banks, may be inconvenienced or sustain positive loss from the fact that their right to pass up and down the stream is impaired. They may be obliged to take a longer route and pass around the obstruction. This is an injury to the right to navigate the stream. But the person whose right of navigation is impaired cannot recover, because whatever injury he suffers, he sustains in common with every other member of the traveling public. And although he may suffer in a greater degree, or although his injury may be attended with particular damages, he cannot recover, because the injury is to a right which he has, merely as a member of society. He is deprived only of the privilege of participating in the public right of navigation, *jus publicum*. This right, to pass and repass along the public highway, is not dependent upon the ownership of any riparian property, nor is it any greater by virtue of such ownership. The right is one which inheres in him as an individual, whether he owns the bank or not; and although if he

chances to own such property in the immediate neighborhood of the obstruction, he may suffer in a greater degree, nevertheless, as already pointed out, his injury is to the public right of navigation and is something which he sustains in common with all others.

Most of the cases which have come up in this court are cases where recovery has been sought for an impairment of this right, and damages have uniformly been denied.

The true ground for refusing recovery where damages are claimed for this class of injuries is that suggested above, and upon this ground this court has repeatedly based its decisions. It is obvious from this that the mere fact that a private individual chances to own riparian property near to the obstruction, would not change the character of the injury, nor place him in any better position for the recovery of damages, than an individual who owned no property at all. The injury consists in interfering with the right to pass or repass along the stream, and this is obviously the same whether a given individual is also a riparian owner or not.

Although Congress has an undoubted right to appropiate the bed of the steam under the power to regulate commerce, we have seen no claim anywhere advanced that the land abutting upon navigable waters is itself subject to the right of Congress to control navigation in the sense that it may be appropriated by the Federal Government, without compensation first being paid therefor. On the contrary, we think it cannot be seriously disputed that the upland cannot be appropriated under the commerce clause of the Constitution, without compensation being paid to the owner.

If the upland itself cannot be appropriated, it would seem clear that whatever is or constitutes a part of that land, or the enjoyment thereof, cannot be appropriated.

Otherwise, the statement that the land is not subject to appropriation would mean little or nothing. The vital question appears to be, is the right of access, which is appurtenant to the upland, such a part thereof, that it cannot be appropriated or destroyed, or, in the words of the Constitution, "taken," without compensation? Is the right of ingress to and egress from riparian property a thing of value? If it is, there would appear to be no question but that it could not be destroyed, nor its owner deprived of it without compensation.

In Gould on Waters, 2nd Ed., Sec. 151, the author says: "When it is conceded that riparian rights are property, the question as to the right to take them away without compensation would appear to be at an end."

Starting with the familiar proposition that private property cannot be taken for public purposes without just compensation, it will be our purpose to show: first, that the right of access is property and a thing of value; second, that it constitutes a part of the land; and third, that being a part of the land it is no more subservient to the right of Congress to appropriate property, under its power to regulate commerce, than is the land itself. It being once granted that it is property, and a thing of value in the eye of the law, and an integral part of the upland, its appropriation could no more be justified on the ground that it was a result incident to the exercise of the right of the Federal Government to occupy the bed of the stream, than the appropriation of the land itself. The significance of this will appear presently.

This right of access, it is important to note, is quite distinct from any right which the owner of the upland may possess, in common with the rest of the public, to navigate the stream, and is entirely independent of and distinct from the ownership of the submerged land. It is a right which is pertinent to the upland; it is necessary

to its enjoyment, and passes with the land as the latter passes from one owner to another. It is not an easement in gross, inhering in a private individual, as such, but inheres in the land itself.

Riparian rights are such as follow or are connected with the banks of streams and rivers. The mere etymology of the word indicates that the term applies to those rights which are connected with the bank or the upland. These rights are distinct from rights growing out of ownership of the bed of the stream, and depend upon the ownership of the land contiguous to the water, being the same whether the proprietor of such land owns the soil under the water or not.

Gould on Waters, 2nd Ed., Sec. 148.
Jones vs. Johnston, 18 How., 150.
Johnston vs. Black, 209.
Bates vs. Ill. Central Ry. Co., 1 Black, 204.

Included within these so-called "riparian rights" is the right of access, which is the right of the owner of the land to pass from his land upon the water and *vice versa*. This right of access exists by virtue and in respect of his riparian property. The riparian owner has the right to the water frontage, belonging by nature to his land, although the only advantage of it may consist in the access thereby offered him to the water, for the purpose of using the right of navigation. This right of access is a private right, wholly distinct from the right of its owner to use the stream for purposes of navigation in common with the rest of the public. "It is distinct from the public right of navigation, and an interruption of it is an encroachment upon a private right, whether caused by a public nuisance or authorized by the Legislature."

Gould on Waters, 2nd Ed., 149, p. 304.

The English courts have repeatedly recognized this distinction and the cases disclose a consistent adherence to it.

In Rose vs. Groves, 5 M. & G., 613, where an inn-keeper recovered damages against the defendant for wrongfully preventing the access of guests to his house upon the river Thames by placing timbers in the river opposite the inn, Tindall, C. J., said: "This is not an action for obstructing the river, but for obstructing the access to the plaintiff's house on the river."

Attorney-General vs. Conservators of the River Thames, 1 Hemming & Miller, 1, points out the distinction, in discussing the question of the extent to which the Government may authorize interference with the rights of a riparian owner for the purpose of improving the navigability of a stream. The Court says:

"Now I apprehend that *the right of the owner of a private wharf, or of a roadside property, to have access thereto, is a totally different right from the public right of passing and repassing along the highway or the river.*"

In Lyon vs. Fishmongers' Co., 1 App., Cases 662, 10 Ch., 629, Lord Cairns, speaking of Rose vs. Groves, said:

"As I understand the judgment in that case, it went not upon the ground of public nuisance, accompanied by particular damage to the plaintiff, but upon the principle that a private right of the plaintiff had been interfered with. The plaintiff, an inn-keeper, on the banks of a navigable river, complained that the access of the public to his house was obstructed by timber which the defendant had placed in the river; and it would be the height of absurdity to say that a private right was not interfered with, when a man who has been accustomed to enter his house from a highway finds his doorway made impassable, so that he no longer had access to his house from the public highway. This would equally be a private in-

jury to him whether the right of the public to pass and repass along the highway were or were not at the same time interfered with. In Rose vs. Groves, Chief Justice Tindall put the case distinctly upon the footing of an infringement of a private right. He says: 'A private right is set up on the part of the plaintiff, and to that he complains that an injury has been done;' and then, after stating the facts, adds, 'It appears to me, therefore, that the plaintiff is not complaining of any public injury.'

Independently of the authorities, it appears to me quite clear, that the right of a man to step from his own land onto a highway, is something quite different from the public right of using the highway."

"Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *qua* owner or occupier of any lands on the bank, nor is it a right which *per se* he enjoys in a manner different from any other member of the public. *But when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character.* It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place, and it becomes a form of enjoyment of the land, the disturbance of which may be vindicated in damages by an action or restrained by an injunction. **It is, as was decided by this House in the cases to which I have referred, a portion of the valuable enjoyment of the land, and any work which takes it away is held to be 'an injurious affecting of the land,' that is to say, the occasioning to the land of an *injuria* or an infringement of right.** The taking away of river frontage, interrupting the access between the wharf and the river, may be an injury to the public right of navigation; but it is not the less an injury

to the owner of the wharf, which, in the absence of parliamentary authority, would be compensated by damages or altogether prevented."

In referring to the case of the Attorney-General vs. Conservators of the Thames, 1 H. & M., 6, Lord Cairns says, speaking of a direct interference with the access to a wharf: "Now I apprehend that the right of the owner of a private wharf, or of a roadside property, to have access thereto, is a totally different right from the public right of passing and repassing along the highway on the river."

The late Lord Wensleydale observed in this house in the case of *Chasemore vs. Richards:* "The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has been now settled that the right to the enjoyment of a natural stream of water on the surface *ex jure naturae* belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbor's soil for his own in its natural state. His right in no way depends upon prescription or the presumed grant of his neighbor.

"My Lords, I cannot entertain any doubt that the riparian owner on a navigable river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights as an ordinary riparian owner underlying and controlled by, but not extinguished by the public right of navigation."

The question was also considered in *Metropolitan Board of Works vs. McArthur*, 7 House of Lords Law Reports, 243.

"According to these decisions," says Gould, § 124, "which do not differ in principle from Brayton vs. Fall River, and Haskell vs. New Bedford, it is the right of access to and from the highway, and not the right of access by means of the highway, which is regarded as a private right." *The distinction, in other words, is between the right of immediate access from a man's property to a highway and vice versa, and the power to complain of a mere obstruction to his progress in the highway after he gets there.*

Caledonia Ry. Co. vs. Ogilvy, 2nd Macq. Sc. App., 229.
Montreal vs. Drummond, 1 App. Cas., 384.
Bell vs. Quebec, 5 App. Cas., 8497; 2 L. R., 305.

There is a clear distinction between the case where an obstruction placed in a river impairs the navigation of the stream and incidentally makes the access to the adjacent owner's land more difficult, and a case where the obstruction is placed across the front of the land wholly cutting off ingress and egress. As was said in Attorney-General vs. Conservators of the River Thames, supra, "in truth the access is not blocked up; the wharf will not be as easily approached, and perhaps not at all by the same route, but that is a mere interruption to the navigation on the river, which they enjoy in common with the public, and not as part of their special right of access."

The distinction is clearly brought out in the case of Rose vs. Groves, 5 M. and G., 613 (where an inn-keeper recovered damages against the defendant for wrongfully preventing the access of guests to his house, upon the River Thames, by placing timbers in the river opposite the inn). The Court said: "This is not an action for obstruct-

ing the river, but for obstructing the access to the plaintiff's house on the river."

The same distinction has been recognized in this country. In Gould on Waters, 2nd Ed., page 245, the author says: "Whenever the obstruction immediately adjoins, or is against the front of the plaintiff's premises, it is as to him, a private nuisance for which an action will lie, or which may be restrained by injunction. But when it is at a distance from the plaintiff's land, and the only injury which he sustains consists of inconvenience, or loss of access thereto, without direct and clearly defined damage, other than the general depreciation of property, common in a greater or less degree to all the riparian owners similarly situated, and preventable by an abatement of the nuisance, the plaintiff cannot maintain an action." And in Section 124: "An obstruction in front of one's own premises may prevent his entering upon the highway, and thus interfere with a peculiar right. But when he is once upon the highway he is a traveler like the rest of the public, and though an obstruction at a distance may as effectually prevent ingress and egress as when it is opposite his door, yet the right to pass along the way is one which he shares in common with the general public. Injuries to riparian owners arising from obstructions to the navigation may thus differ from those sustained by members of the public who are simply prevented from exercising the common right of passage upon the water."

For full collation of cases see Gould, Sections 124, 148, et seq.

The right of access from riparian property to the water and *vice versa* has been held to be valuable property, which cannot be destroyed or impaired without compensation.

In Yates vs. Milwaukee, 10 Wall., 497, a municipal corporation which was authorized by the legislature to es-

tablish dock and wharf lines upon rivers within its limits, and to restrain and prevent encroachments upon the rivers and obstructions thereto, declared by ordinance that the plaintiff's wharf was a nuisance to navigation and ordered it abated.

Miller, J., said with reference to lots adjoining navigable rivers, "whether the title to the owner of such a lot extended beyond dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see fit to impose for the protection of the rights of the public. * * * This riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaireed. It is a right of which when vested the owner can only be deprived in accordance with the established law; and if necessary that it be taken for the public good, upon due compensation."

See also
Webber vs. Harbor Commis'rs, 18 Wall., p. 57.
Richardson vs. Boston, 24 Howard, 188.
Van Dolsen vs. New York, Blatch., 454.
Gould on Waters, 2nd Ed., p. 305, Note 4, and cases cited.

This holding has been recognized and approved by this court in several cases. In the case of Ill. Central Ry. Co. vs. Ill., 146 U. S., 387, that part of the decision in Yates vs. Milwaukee, wherein the right of access is said to be a valuable property right, which cannot be taken without compensation, is cited approvingly. In Webber vs. Harbor Commissioners, 18 Wall., page 64, Mr. Justice Field

said: "It is unnecessary for the decision of this case to question the doctrine that a riparian proprietor whose land is bounded by a navigable stream, has the right of access to the navigable part of the stream, as part of his land, and to construct a wharf or pier, bridging into the stream for his own use, and the use of others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public, as was held in Yates vs. Milwaukee. On the contrary, we recognize the correctness of the doctrine as affirmed in that case."

In Potomac Steamboat Co. vs. The Upper Potomac Steamboat Co., this Court, in the course of its opinion, quotes from Yates vs. Milwaukee, 10th Wall., 497, approvingly, recognizing the authority of that case, so far as it holds that among the rights of the owner of land bounded by a navigable stream, is "access to the navigable part of the river from the front of his lot, etc." The Court also cites in that opinion, Keyport Case, 3 C. E. Green, 516, which defines the riparian right as "a right placed in the riparian owner, to preserve and improve the connection of his property, with the navigable water." The Court quotes approvingly the language of Lord Cairns, in Lyon vs. Fishmongers Co., Cases, 662-672, supra.

From the foregoing cases it appears that in England the distinction between the rights in land beneath navigable water and the right to pass and repass upon such water on the one hand, and the right of access from riparian property to such water on the other, is clearly recognized. The same distinction has been recognized in this country. The case of Yates vs. Milwaukee, 10 Wall., 497, has already been referred to. This case arose over an attempt to prevent the owner of the riparian front from maintaining a dock and extending it out to the navigable water in front thereof, and the Court discussing the question, says:

"But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are accesses to the navigable part of the river from the front of his lot, the right to make a landing wharf, or pier, for his own use, or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. This proposition has been decided by this Court in the cases of Dutton vs. Strong, 1 Black, 23 (66 U. S. XVII., 29), and R. R. Co. vs. Schurmeier, just cited. The Supreme Court of Wisconsin has gone further and asserts the doctrine that the title of the owner of such a lot extends to the center of the stream, subject to the easement of the public in its use for navigation, and that he may construct docks or landing places for goods or passengers, taking care that vessels employed in navigating the stream are not impeded in their passage nor prevented from the use of all parts of the stream which are navigable. (Walker vs. Shepardson, 4 Wis., 486.) This riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which when once vested the owner can only be deprived in accordance with established law, and, if necessary, that it be taken for the public good, upon due compensation."

We have suggested elsewhere that a person who sustains loss from an obstruction placed in navigable water, but not cutting off his right of access thereto cannot recover because the injury is to the public right of navigation and is an injury which he suffers in common with the rest of the public using the highway, although perhaps in a greater degree. A person, on the other hand, who loses

his right of access not only suffers a loss in common with the rest of the public, but something in addition to that. The reason for denying recovery in the first case would not apply to the latter. This distinction was recognized in the English cases, supra, notably in Lyon vs. Fishmongers. The Supreme Court of Wisconsin also recognizes the distinction in a number of cases, Delaplaine vs. the C. & N. W. Ry. Co., 42 Wis., 214, among others. In that case the plaintiffs owned lots abutting on a navigable lake, and the defendant, without their consent, constructed its railway within the water, but so near the front of their lots as to cut off their access to the body of the lake, leaving along such front a pool of stagnant water. The plaintiff owned only to the water's edge. The Court said:

"But while the riparian proprietor only takes to the water line, it by no means follows, nor are we willing to admit, that he can be deprived of his riparian rights without compensation. As proprietor of the adjoining land, and as connected with it, he has the right of exclusive access to and from the waters of the lake at that particular place; he has the right to build piers and wharves in front of his land out to navigable waters in aid of navigation, not interfering with the public use. These are private rights incident to the ownership of the shore, which he possesses, distinct from the rest of the public. * * * It is evident from the nature of the case, that these rights of user and of exclusion are connected with the land itself, grow out of its location, and cannot be materially abridged or destroyed without inflicting an injury upon the owner which the law should redress. It seems unnecessary to add the remark *that these riparian rights are not common to the citizens at large, but exist as incidents to the right of the soil itself adjacent to the water.* In other words, according to the uniform doctrine of the best authority, the foundation of riparian rights, *ex ri ter-*

mini, is the ownership of the bank or shore." (Italics ours.)

The case of Lyon vs. Fishmongers is discussed, its reasoning approved and its authority recognized. The case does not discuss the question whether recovery could be had in case the legislature attempted to authorize the building of the tracks and to relieve it from liability. But the decision does recognize that the right of access is a valuable property right, a constituent element of the land, and that in its loss the owner sustains an injury in addition to the injury suffered by him as a member of the public at large.

The Court continues: "These riparian rights are undoubted elements in the value of the property thus situated. If destroyed can anyone seriously claim that the plaintiffs have not suffered a special damage in respect to their property, *different both in degree and kind* from that sustained by the general public? It seems to us not."

In Brisbane vs. St. Paul, etc., Ry. Co., 23 Minn., 114, it was held that the state could not give a railroad company the right to occupy a riparian front without making compensation for the injury to riparian rights. On page 130, the opinion is as follows, after citing Dutton vs. Strong, 1 Black, 23; Railroad Co. vs. Schurmeier, 7 Wall., 272, and Yates vs. Milwaukee, 10 Wall., 497: "According to the doctrine of these decisions the plaintiff possessed the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain, for his own and the public use, suitable landing places, wharves, etc. * * * The rights which thus belonged to him as riparian owner of the abutting premises, were valuable property rights, of which he could not be divested without consent, except by due process of law, and, if for public purposes, upon just compensation."

This case has been followed in Carli vs. Stillwater Ry. Co., 28 Minn., 373. On page 380, the opinion reads: "It is claimed that the plaintiff title did not extend to lands covered by the waters of the lake * * *, and such is the law. But it is well settled that the owner of land bounded by a navigable stream has certain riparian rights which spring from the ownership of the bank." * * * Brisbane vs. Ry. Co., supra, is then cited, the portion quoted by us inserted at length. The opinion continues:

"In addition to the authorities cited in the opinion in this case, the doctrine has the authority of a recent English case in the house of lords, and we are satisfied that it rests upon solid grounds of justice and utility. Lyon vs. Fishmonger's Company, L. R., 1 App. Cas., 662."

Monongahela Nav. Co. vs. U. S., 148 U. S., 312, was a case where under the authority of a Pennsylvania legislature the Monongahela Navigation Company had constructed certain locks and dams. "It cannot be doubted," said Mr. Justice Brewer, " * * * that Congress has the power in its discretion to compel the removal of this lock and dam as obstructions to the navigation of the river, or to condemn and take them for the use of promoting its navigability. In other words, it is within the competency of Congress to make such provision respecting the improvement of the Monongahela river as in its judgment the public interests demand. Its dominion is supreme.

But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among others that of the Fifth Amendment. * * * The power to regulate commerce is not given in any broader terms than that to establish post-offices and post-roads; but, if Congress wishes to take private property upon which to build a post-office, it must either agree

upon the price with the owner, or in condemnation pay just compensation therefor. * * * If a man's house must be taken that must be paid for; and if the property is held and improved under a franchise from the State, with power to take tolls, that franchise must be paid for, *because it is a substantial element in the value of the property taken.*"

If this holding is sound, that where *a substantial element in the value of a man's property* is taken, it must be paid for, we fail to see why the taking of a riparian owner's right of access (which, under Yates vs. Milwaukee, Brisbane vs. Ry. Co., Carli vs. Stillwater, Delaplaine vs. C. & N. W. Ry. Co., etc., etc., is a valuable property right and obviously a substantial element in the value of the upland) does not entitle the owner to compensation. The only distinction which occurs to us between the Monongahela case and the case at bar is that in the latter the owner is deprived of an intangible right apart from the appropriation of his land; while in the former the owner was deprived of both. This distinction does not appear to us to be sound. The owner of land may be damaged without taking his land. For example, he is entitled to have his land remain in its natural position; and if an adjacent owner excavates at the dividing line, causing the land to cave in, he is liable in damages. The right to have one's land supported in its natural condition is a valuable right and when abridged, redress can be had.

So also is the right of access to one's lot from navigable water a valuable right; and while Congress may appropriate the submerged land for a proper purpose, it must do so without destroying or abridging the private rights of the adjoining proprietor. In other words, as is said by Gould, in the work to which we have had occasion to refer before, when it is conceded that riparian rights, including the right of access, are property, the question of the right

to take them without compensation would seem to be at an end.

The question of the power of the State to authorize works which impair riparian rights, under its right to control commerce and navigation, so long as that sphere of legislative control is not entered by the Federal Government, is the same question involved here. It was early decided by this court that this power was derived from the respective States and that therefore the Federal Government has no other or greater power in this respect than the States themselves had, or still have so long as Congress does not exercise the power thus ceded to it by the States.

This being the case, the States and the United States in the exercise of this power, are subject to the same limitations.

In Pollard's Lessee vs. Hagan, 3 How., 219, it was held that the United States has not the title to the land beneath navigable waters, but that this is in the respective Sates. That under the constitution the power to control the same, for purposes of commerce and navigation, was ceded by the original States to the general government; and that the new States admitted to the Union stand in all respects on an equal footing with the old. The general government has merely the right to exercise this power when it chooses; and in the exercise thereof, it has no greater rights than belonged to the States themselves. Not only this, but until the general government exercises this power, the States may still do so. It becomes apparent from this that whatever limitations have been placed upon this power by the courts when it has been exercised by the States, would also be imposed upon that power when exercised by the United States.

South Carolina vs. Georgia, 93 U. S., 4.

We have already cited some cases where it has been held that the State cannot deprive the riparian owner of his right of access. There are many others which space will not permit us to insert here. We refer the court to Gould vs. Waters, 2d Ed., secs. 123-124, for a full collection of authorities. The distinction must be kept in mind between injuries to riparian rights which are private in their nature and injuries to the right of navigation, which is public. We have already discussed this question at some length. Gould says, sec. 123: "Whenever the obstruction immediately adjoins or is against the front of the plaintiff's premises, it is as to him a private nuisance for which an action will lie, or which may be restrained by injunction." And in sec. 124: "An obstruction in front of ones own premises may prevent his entering upon the highway and thus interfere with a peculiar right. But when he is once upon the highway he is a traveler like the rest of the public, and though an obstruction at a distance may as effectually prevent ingress and egress as when it is opposite his door, yet the right to pass and repass along the way is one which he shares in common with the rest of the public."

An examination of some of the cases decided by this Court, in which damages have been denied for injuries resulting from obstructions placed in streams under congressional authority, discloses that the loss resulted from an injury to the right of passage upon the highway after the riparian owner gets upon it and not from the exclusion of the owner from access to the water from his lot and vice versa.

Gibson vs. U. S., 166 U. S., 69, was a case where the plaintiff owned a farm upon an island in the Ohio river, having a water frontage of 1,000 feet. Upon this front she had constructed a landing from which she was accustomed to ship produce by way of the river. Congress

authorized the construction of a dike in the river for the concentration of the water into a certain channel and plaintiff's landing was thereby rendered less accessible. The court of claims made certain findings upon which the decision was based, and among others the following:

"VII. Claimant's access to the navigable portion of the stream was not entirely cut off; at a 9-foot stage of the water, which frequently occurs during November, December, March, April and May, she could get into her dock in any manner; that from a 3-foot stage she could communicate with the navigable channel through the chute; that at any time she could haul out to the channel by wagon."

From this it appears that plaintiff's right of access to navigable water was not destroyed but, at the most, rendered more difficult. It was always possible for her to reach navigable water and although her premises were rendered less valuable by reason of the inconvenience, nevertheless the connection between her land and the water was not destroyed. The situation in this case is analogous to the situation in the present case prior to the construction of the new south pier. The old pier extended across a portion of plaintiff's farm, but there was always a gap of some 300 feet through which access to navigable water could be had. (See, Statement of Case Supra.) The present pier cuts off access entirely, and the plaintiff is even prohibited from crossing the pier to communicate with his land. The decision in the Gibson case must be taken in connection with the facts of that case; and although the opinion states broadly that riparian rights are subject to the paramount right of Congress to appropriate them under the commerce clause, nevertheless, all that was actually decided was, that those rights which the riparian proprietor has in the bed of the stream by virtue of his ownership of the upland are subject to appropria-

tion by Congress, and that any damage suffered by the riparian owner as a result of the appropriation of his submerged land by which he is inconvenienced in navigating the stream after he gets upon it, whether that navigation be for the purpose of reaching his own land or otherwise, is an injury suffered by him in common with the rest of the public.

An examination of the cases cited in Gibson vs. United States, and upon which that decision is based, discloses that the holding is grounded upon this last mentioned doctrine.

In the Gibson case, the Court cites Eldridge vs. Trezevant, 160 U. S., 452. In that case it was held that where the State of Louisiana directed a levee to be built upon and across the land of a riparian owner, such owner was not deprived of his property without compensation, in contravention of constitutional guaranties. This holding, it is important to note, proceeded upon this theory, that the riparian property was, and had been prior to the admission of the State of Louisiana to the Union, subject to a servitude in favor of the public, making it liable to appropriation for the purpose of protecting the surrounding country from inundation. In that case, Bass vs. State, 34 La. Ann., 494, is cited, in which a similar right in the State was justified under the police power. The case of Eldridge vs. Trezevant, proceeded, therefore, upon a doctrine peculiar to the State of Louisiana, which justified the taking of riparian property without compensation to secure the public safety. This is in effect invoking the doctrine of the police power. There is nothing in that decision to indicate that this Court would have held similarly on that state of facts, in a jurisdiction where that peculiar doctrine did not obtain.

The case of Gibson vs. U. S. is in harmony with Yates vs. Milwaukee. The case proceeded not upon the theory

that the right of access was not valuable property, but upon the well-known doctrine that any incidental damage resulting from an obstruction placed in navigable waters by Congress, for the improvement of commerce, could not be recovered for, where the damage was suffered by an individual in common with the rest of the public, although in a greater degree..

In none of the cases cited in Gibson vs. U. S. do we find that it denied that the right of access is a valuable property right, nor is it anywhere asserted that it is any more liable to appropriation without compensation, than the upland itself, of which it forms a part.

In Shively vs. Bowlby, for example, the familiar doctrine was announced that the submerged land was subservient to the paramount right of Congress. That case went no further. There is nothing in that case inconsistent with our contention that the right of access belonging to the upland, and which inheres in the owner thereof irrespective of whether he has also the title to the submerged land, is a valuable property right.

The decision in Gibson vs. U. S. is based also upon the doctrine that the occupancy by Congress, of the bed of a stream being lawful, any incidental damage suffered by riparian proprietors is *damnum absque injuria*. While the decision in that case did not require any other doctrine to be invoked, than the one already stated, i. e., that the injury to Mrs. Gibson was simply to her right to participate in the *jus publicum* of navigating the stream, and was therefore only such as she sustained in common with other members of the traveling public, although in a greater degree, still it cannot be said in any case that the appropriation of private property could be justified on the ground that it was merely incidental or necessary to the exercise of a lawful governmental power. Certainly if the upland itself were taken, Mr. Scranton could re-

cover, and the fact that his damage was merely incidental to the exercise of a proper governmental function would make no difference. If that function cannot be exercised without taking private property, then that private property must be paid for. Likewise, if the right of access is a valuable property right, forming a part of the upland, or, as was said in Monongahela Nav. Co. vs. U. S., supra, "a substantial element in the value of the land," and this and other Courts have said that it is, then that cannot be taken without compensation.

In the case of Priewe vs. Wisconsin State Land Company, 33 L. R. A., 650, it was said:

"In this State it has been repeatedly held that the riparian proprietor upon navigable lakes or ponds takes the land only to the water's edge, but, that, as such proprietor, he has the exclusive right of access to and from the lake in front of his land, * * * * that such rights grow out of his title to the land, and have a pecuniary value, and their destruction or material abridgement is generally an injury, entitling him to redress." (Citing cases.)

In North Shore Ry. Co. vs. Pion, 14 App. Cas., 612, 620, affirming the judgment in same case entered by Supreme Court of Canada, 14 Can. Sup. Ct., 677, it was held that a riparian owner on a navigable river is entitled to damages against a railway company, although no land is taken from him, for the obstruction of his access between his property and navigable water, caused by the construction of a railway. The decision in the Supreme Court of Canada reads: "In the present case, * * * * the substance of the plaintiffs' claim in their action is that the defendants have illegally constructed a work on the navigable waters of the River St. Charles in front of their property which cuts off all access between their property and the navigable waters of the river. If this allegation

be true the cases conclusively decide that the charge involves an infringement of a right of privilege incident to the land, which is an actionable wrong."

Cooley, in his "Constitutional Limitations," 6th Ed., p. 666, says:

"Any proper exercise of the powers of government, which does not directly encroach upon the property of an individual, or disturb him in its possession or enjoyment, will not entitle him to compensation, or give him a right of action." Assuming this to be a correct statement of the law it follows that an individual is entitled to compensation when (1) his property is directly encroached upon, or when (2) he is disturbed in his possession, or (3) his enjoyment of the same.

This reference is supported by the language of the same author on page 670 of the same work:

"On the other hand, any injury to the property of an individual which deprives the owner of the ordinary use of it, is equivalent to a taking, and entitles him to compensation."

It will not be necessary to recall the authorities which in our opinion establish beyond question that the right of access is an incident to the land and its exercise a form of the enjoyment thereof. Nor do we think it can be seriously disputed that the plaintiff in error has been disturbed in the possession and enjoyment of his land, when he is absolutely cut off from going upon it from the water and from going from it upon the water. So far as anything in the record is concerned this may be his only means of ingress and egress. We think it can hardly be said that he is not entitled to recover on the ground that his loss is only such as is sustained by him as a member of the traveling public.

The case of Transportation Co. vs. Chicago, 99 U. S., 635, goes farther than any we have found, towards hold-

ing that the destruction of the right of access is *damnum absque injuria*. It is to be noted in connection with that case, however, that the interruption of access was only temporary, while in the case at bar it is permanent. Whatever may have been the extent of that holding in that case, we have no hesitation in saying that if it was intended to lay down the rule that an individual can be shut up in his lot with no means of access to the highway without compensation, the case cannot, in our opinion, be justified on authority, nor upon principles of ordinary justice.

The obviousness of this must appear, when it is once conceded that the right of access is a valuable property right, a *jus privatum* as distinguished from a *jus publicum*, and that it constitutes a means of enjoying the land. If this is granted, the right of access is a part of the land, and its destruction could no more be justified on the ground that it is only incidental to the prosecution of a lawful work, than could the taking of the land itself.

The courts of New York have come finally to recognize that this right of access cannot be cut off without compensation by a work done under the authority of the State Legislature.

> Williams vs. New York, 105 N. Y., 419, 436.
> Kane vs. N. Y. Elevated Ry., 125 N. Y., 164, 184.
> Rumsey vs. N. Y. & N. E. Ry., 133 N. Y., 79 and 136 N. Y., 543.

We have gone into this subject somewhat extensively because we feel that it is a subject of considerable importance, not only to the plaintiff in error, but to the public generally. To summarize: We contend that the right of access is a valuable property right; that it is a part of the upland; that it inheres in the owner regardless of whether he also owns the submerged land; that it is a private right distinct from the right to navigate the

stream after the owner is upon the stream; that although a riparian owner cannot have redress for an obstruction which does not cut off his right of access, because his injury is to the jus publicum, and is something which he suffers in common with the rest of the public, still he cannot be deprived of his right to pass from his land onto the water and vice versa, without first being paid just compensation.

"And though it is easy to suggest metaphysical difficulties, when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other," says Lord Cairns, "this does not alter the character of the right."

The proposition that the plaintiff in error can be cut off entirely from reaching deep water by boat, and prohibited from crossing the pier which shuts him in, does not commend itself to the conscience when tested by the ordinary principle of natural justice, of which, we assume, the fifth amendment was but the formal legal expression.

There is another question on this case which was decided favorably to the plaintiff in error, by the Supreme Court of Michigan, and which we will not go into at any great length. It concerns the right to maintain this action against this defendant. It was held by the Circuit Judge in the Chippewa Circuit Court, that this action could not be maintained because a judgment against this defendant would be in effect a judgment directly against the United States. Both the Supreme Court of Michigan and the Circuit Court of Appeals for the Sixth Circuit,

held otherwise, and we feel confident that a brief reference to the opinion in the latter case will suffice to convince this Court of the correctness of that holding. (See Scranton vs. Wheeler, 6 C. C. A., 585.)

That part of the opinion bearing upon the question we will insert here.

"Except where Congress has provided the United States cannot be sued. This proposition is axiomatic. But the doctrine has no application to officers and agents of the United States, who while in possession are sued in ejectment by one claiming the title and right of possession. When such officer and agent is sued and he undertakes to justify and defend his possession by setting up and relying upon the title and right of the United States, a judicial question is presented, and the court may inquire into such title, and determine whether it is the superior right and title, and render judgment as the right may appear. This has been the well-settled practice and rule of the United States Court, and in the well-considered case of United States vs. Lee, reported in 106 U. S., 196, the doctrine was thoroughly considered and the cases elaborately reviewed by Mr. Justice Miller, who delivered the opinion of the Court. When a suit may be conducted alone against the party in possession, as is the rule in ejectment, the person under whom the defendant claims is not a necessary party. The judgment in this case will not conclude or estop the United States, for the reason that it is not a party, and cannot be made a party without its consent.

Carr vs. United States, 98 U. S., 433.

"In United States vs. Lee, the Court said in regard to the effect of the judgment in that case:

"'Another consideration is, that since the United States cannot be made a defendant to a suit concerning

its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the Government, as is decided by this Court in the case of Carr vs. United States, already referred to, the Government is always at liberty notwithstanding any such judgment, to avail itself of all of the remedies which the law allows to every person natural or artificial for the vindication or assertion of its rights. Hence taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined, or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid according to the Constitution' (106 U. S., 222). That decision upon its reasoning was sound and meets the approval of this court. The constitutional provision that 'no person * * * shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation,' finds its strongest safeguard and most efficient vindication in the doctrine so ably presented by the learned judge who spoke for the majority of the Court in that case. The attention of the Court has been called to the late decisions of the same court in the cases of Stanley vs. Schwalby, 147 U. S., 508, and Hill vs. United States, Supreme Court Reporter, vol. 13, No. 28, decided May 15, 1893.

"In the first of these cases, Stanley vs. Schwalby, the suit was an action of trespass to try title. The property involved was the military post at San Antonio, Texas. The defendants were Gen. Stanley and other officers of the United States. The suit, though it involved the title and possession of the United States to one of its military posts, was maintained. The reporter's head-note to the opinion is somewhat misleading in so far as he states that 'for purposes of jurisdiction there is no distinction between suits against the Government directly, and suits against its property.' The jurisdiction would not exist unless permitted by Congress, where it was directly against the Government, while, as decided in that case, if the suit be against one in possession, and he claims under the Government, the jurisdiction does exist. In that very case the court said in regard to the latter class of cases that, 'In these cases he is not sued as an officer of the Government, but as an individual, and the court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defense he must show that his authority was sufficient in law to protect him.' In this class is included United States vs. Lee, 106 U. S., 196, where the action of ejectment was held to be in its essential character an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment, and the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this Court held to be lawful, and therefore is insufficient as a defense. 'The statutes of limitation were held applicable,' upon the express ground that 'as an action could have been brought at any time after adverse possession was taken, against the agents of the Government through whom that was done, and by whom it was retained, the objection cannot be raised against

them that the statute could not run because of inability to sue.' (147 U. S., 519.)

"The case of Hill vs. United States has no application. The action was directly against the United States for a tort and was sought to be sustained under the act of March 3, 1887, C., 359, by which Congress provided that the United States might be sued either in the Court of Claims or in the Circuit Court of the United States in cases not sounding in tort. The case is in accord with United States vs. Jones, 131 U. S., 1; Langford vs. U. S., 101 U. S., 341, and U. S. vs. Great Falls Mfg. Co., 112 U. S., 645, and *id.*, 124 U. S., 581."

The case of Tindal vs. Wesley, 17 Sup. Ct., 770, decided by this Court May 10, 1897, reviews the cases on this point at some length and holds that where one attempts to justify his possession under the authority of the government he must show that the right of the government is paramount, or judgment will go against him.

The grant of the upland to the plaintiff in this suit, carried with it the fee of the submerged land abutting thereon; and this is so, notwithstanding the fact that the grant from the United States is confined to the meander line of the stream.

The United States never acquired title to the beds of navigable waters and consequently it was not within the power of that government to grant title to them. In Barney vs. Keokuk, 94 U. S., 324, 328, this Court, speaking of the proprietorship of the beds and shores of navigable waters, said: "It properly belongs to the States by their inherent sovereignty, and the United States has wisely

abstained from extending (if it could extend) its survey and grants beyond the limits of high water."

The case of Pollard vs. Hagan, 3 How., 219, 1845, decided, (1) that the shores of navigable waters and the soils under them were not granted by the Constitution to the United States, but were reserved to the States respectively; (2) that the new States have the same rights, sovereignty and jurisdiction over this subject as the original States; (3) that the ordinance of 1787 providing for the government of the Northwest Territory, that all navigable rivers should remain forever public highways, did not confer upon the Federal Government any power or right to dispose of the land in the bed of the stream, or lessen the title or control thereof by the respective States.

The limitation in the grant from the United States of the land in question, to the meander line, is of no significance, but finds its explanation in the fact that the Federal Government had no authority to grant anything further. The title to the submerged lands in question is in the State of Michigan unless the latter chooses to relinquish its title therein to the owner of the upland. Under the Michigan decisions there can be no doubt that the riparian proprietor owns the bed of the stream subject to qualifications of which we shall speak presently. In Pere Marquette Boom Company vs. Adams, 44 Mich., 405, Mr. Justice Cooley uses the following language: "It has been repeatedly decided in this State that private ownership of lands bounded on navigable fresh water is not restricted to the meander line. (Lormon vs. Benson, 8 Mich., 18; Bay City Gas Light Company vs. Industrial Works, 28 Mich., 182; Maxwell vs. Bay City Bridge Company, 41 Mich., 453.) If it were held that the owner of the bank did not own also the land within the meander line, it would belong not to the United States, but the State (Pollard vs. Hagan, 3 Howard, 219), and it is notorious

that the State never questions the right of the owner to the shore, but concedes it."

In Webber vs. Pere Marquette Boom Co., 62 Mich., 626, it was held that where the United States granted lands bordering on navigable water, and subsequently granted certain shoal land covered by shallow water in front and within the riparian boundaries of the first grant, the second grant was void.

The laws of the State govern in determining riparian rights on a navigable river, although the property is held under a grant from the United States. Webb vs. Demopolis, 95 Ala., 116; Scranton vs. Wheeler, 6 C. C. A., 585.

These cases are sufficient to show that as between the United States and the State of Michigan the title to the submerged lands in question is not in the United States.

The ownership of the upland in Michigan carries with it the title to the submerged land abutting upon the same, comprehended within parallel lines extended perpendicular to the general trend of the shore along his land to the thread of the stream.

Ryan vs. Brown, 18 Mich., 207.
Lorman vs. Benson, 8 Mich., 18.
Rice vs. Rudtiman, 10 Mich., 125.
Pere Marquette Boom Co. vs. Adams, 44 Mich., 403.
Bay City Gas Light Co. vs. Industrial Works, 28 Mich., 182.
Maxwell vs. Bay City Bridge Co., 41 Mich., 453.
Webber vs. Pere Marquette Boom Co., 62 Mich., 626.
Clute vs. Fisher, 65 Mich., 48.
Bigelow vs. Shaw, 65 Mich., 341.
Watson vs. Peters, 26 Mich., 508.

The title to the bed of the stream is therefore in the State, or in the owner of the upland, and as was said in Barney vs. Keokuk, 94 U. S., 324; St. Louis vs. Meyers, 113

U. S., 566, and Pere Marquette Boom Co. vs. Adams, 44 Mich., 405, where a State concedes the title to be in the riparian proprietor by virtue of his ownership of the upland, neither the United States nor any person can question it.

Although the plaintiff in error unquestionably owns the submerged land abutting his property, still the United States has an equally unquestioned right to occupy that land provided it does so for a lawful purpose and in a lawful manner. As soon, however, as its officers exceed the limits of their power and infringe upon the rights of the riparian owner, they are, as to him, trespassers. It being granted that the erection of the pier cutting off plaintiff's right of access, is wrongful as against plaintiff in error, then the defendant is a trespasser upon plaintiff's land and he can be evicted.

The action of ejectment is the proper remedy in this case. The defendant claims the right to maintain the pier in question across the entire riparian front. The plaintiff claims title to only an undivided one-half of the premises. Under the well-settled law the plaintiff would as against this defendant who is a mere intruder and trespasser, be entitled to a judgment ousting them from the possession of the entire tract. There is a difference between the rights of tenants in common and of joint tenants in an action between themselves, and rights of the parties and the form of the judgment where one is a tenant in common and the other a mere trespasser.

The distinction is very well marked and the principles underlying it enunciated in the following decisions:

Freeman on Co. Tenancy, secs. 343-344.
Telfener vs. Dillard, 70 Tex., 139.
Wheeling P. & B. R. R. Co. vs. Maxwell, 122 Pa. St., 613.
Sewers vs. Peterson, 59 Tex., 217.
Pilcher vs. Kirk, 60 Tex., 162.

Contrevas vs. Haynes, 61 Tex., 103.
Harber vs. Dyches (Tex.), Oct. 28, 1890.
Smith vs. Smith, 80 Cal., 324.
Mahoney vs. Van Winkle, 21 Cal., 583.
Hart vs. Robertson, 21 Cal., 349.
Touchard vs. Crow, 20 Cal., 162.
Weise vs. Baker, 7 Col., 180.
Jancey vs. Greenlee, 90 N. C., 319.
Logan vs. Goodell, 42 Ga., 118.
Hardy vs. Wallace, 1 Wall., 371.
Allen vs. Gilson, 4 Rand (Va.), 468.
4 Nev., 416.
Voss vs. King, 33 W. Va., 236.
Carley vs. Paxton, 75 Tex., 98.
Bounds vs. Little, 75 Tex., 316.
Moody vs. Johnson, 17 S. E., 579 (N. C.).

Angell on Watercourses, Secs. 8-9, says, in discussing the question of a right to a water course, that it is a part of the freehold, of which no man can be disseized but by lawful judgment of his peers, or by due process of law.

"Still, no action will lie to recover possession of a water-course by that name * * * the action must be for the *land* at the bottom, calling it "twenty acres of land covered by water."

2 Black Comm., 18.
Remington on Eject., 131.

It has been definitely settled by the Supreme Court of Michigan that ejectment is the proper remedy for the recovery in cases like the one at bar.

Cole vs. Wells, 49 Mich., 450.
Beidellman vs. Folk, 5 Watt., 308.
Lawe vs. Kaukaua, 70 Wis., 306.
Nichols vs. Howland, 52 Hun., 287.
Gould on Waters, Secs. 185, 194 and 471.

For further discussion of right of ejectment see notes Secs. 8 and 9; Angell on Watercourses.

It should not be lost sight of, that plaintiff in error does not complain of nor ask redress for the mere occupation of the bed of the stream, but for the destruction of his right access. Had the latter been left no action could have been maintained. It would have been an easy matter for the United States Government to have provided an opening in the south pier for the ingress and egress of the plaintiff in error to and from his land. Upon its failure to do so, all that remained was to unload his cargo across the pier in question. If, however, the Government deemed it inadvisable to do the one thing or to permit the plaintiff in error to do the other, but considered it necessary to cut off his access altogether and close him in, then it must pay him for the property thus taken.

Independent of all authorities, we consider that this is the only conclusion which can be sustained on principle or commends itself to the ideas of natural justice.

It is submitted that the judgment should be reversed.

HARLOW P. DAVOCK and
JOHN C. DONNELLY,
Counsel for Plaintiff in Error.

1376

FOLD OUT IS TOO LARGE TO BE FILMED

No. 262 Oct. Term 1899

Office Supreme Court U. S.

13

Sup. Ct. Brf. of Donnelly for P. E.

APR 15 1899

JAMES H. McKENNEY, Clerk

SUPREME COURT OF THE UNITED STATES.

October Term, 1898.

Filed April 15, 1899.

GILMORE G. SCRANTON,
Plaintiff in Error,

vs.

EBEN S. WHEELER,
Defendant in Error.

No. 262.

In Error to the Supreme Court of Michigan.

Supplemental Brief for Plaintiff in Error.

JOHN C. DONNELLY,
Counsel for Plaintiff in Error.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.,
1899.

SUPREME COURT OF THE UNITED STATES.

GILMORE G. SCRANTON,
Plaintiff in Error.

vs.

EBEN S. WHEELER,
Defendant in Error.

No. 262.
October Term, 1898.

Supplemental Brief for Plaintiff in Error.

A statement of the facts and of the errors assigned will be found in the principal brief filed by the plaintiff in error. It is proposed to discuss herein one or two aspects of the case not therein touched upon.

ARGUMENT.

I.

The rights of a riparian owner in a navigable stream bordering upon his land may be classified as follows:

(1) Those rights which he has in the submerged soil abutting his upland;

(2) Those rights which he has in the navigation of the stream when traveling upon it; and

(3) Those rights which belong to him (or more properly, to the riparian land which he owns), to reach navigable water from his land and *vice versa*.

These rights differ in their origin and in the method of, and the limitations placed upon, their enjoyment. A clear

apprehension of these distinctions is necessary to an understanding of our position in the present case.

As to the rights included within the first class, it is important to note the following:

In the State of Michigan the owner of riparian property owns the submerged soil to the center of the stream. If this does not come to him by express grant, it devolves upon him by operation of law. The title which he thus acquires in the bed of the stream is subject to this important qualification: it is subservient to the paramount right of Congress to occupy the land for the purpose of regulating commerce and navigation. Congress can, in its discretion, appropriate the bed of the stream for that purpose without making compensation to the riparian owner. This is not a "taking" of his property requiring compensation, because for this purpose the property is not his.

As to the rights falling within the second class, the following is to be noted:

These rights inhere in the owner of the bank as an individual member of the public. The right to navigate the stream after he is once upon it, is a public right, *jus publicum*. Every member of society enjoys the privilege of participating in this right, in the same manner and to the same extent as every other member. The enjoyment of this privilege is independent of the ownership of riparian property or the soil over which the stream flows; and is neither greater nor less by virtue of such ownership. Being a right belonging to all the members of society, any injury to that right is an injury which one member sustains in common with all others, and being an injury to a public right, it cannot be redressed by private action. When an obstruction is placed in a navigable stream, such as a pier, a bridge or a lighthouse, adjacent riparian owners may be seriously inconvenienced and

suffer great loss from the fact that the obstruction, although improving the navigability of the stream generally, interferes with their particular method of using it. One owner may find that after he is upon the stream he must pursue a longer or more hazardous route, and he may therefore suffer in a greater degree than his neighbor. But, as pointed out before, the right to pass and repass upon the stream after reaching it, is a public right, and compensation cannot be had by private parties for any injury affecting it.

Of the rights embraced within the third class, the particular right which concerns us, is the right of access to the navigable water from riparian property, and *vice versa*.

As to this right it should be noted:

1. It is a private as distinguished from a public right.

2. It belongs to the owner of the upland by virtue of such ownership.

3. It exists independent of whether the riparian owner also owns the submerged land;

4. It is entirely distinct from the public right of navigation or from the right of any individual to participate in that public right.

It is this latter right alone which, if our position is correct, cannot be destroyed without compensation first being paid to the owner.

While Congress can undoubtedly authorize the occupation of the submerged land and can place obstructions in the stream, interfering with some methods of enjoying the public right of navigation without the payment of compensation, it has been nowhere claimed, so far as I am aware, that the upland itself can be thus appropriated for that purpose. This being granted, it follows that if the right of access is a part of the upland, and is in law a valuable right, no more can it be appropriated without

compensation. This is the conclusion arrived at by Mr. Gould in his work on "Waters," § 151, 2d Ed.

"When it is conceded that riparian rights are property, the question as to the right to take them away without compensation would appear to be at an end."

This right of access is a private right and "an interruption of it is an encroachment upon a private right, whether caused by a public nuisance or authorized by the Legislature."[1]

The right to pass from one's land onto the water and *vice versa* is something quite different from the right to pass up and down the stream after getting upon it. The distinction has been clearly recognized in the English cases. It was stated in one of these cases as follows:

"Now, I apprehend that the right of the owner of a private wharf, or of a roadside property, to have access thereto, is a totally different right from the public right of passing and repassing along the highway or the river."[2]

In these English cases, a number of which are discussed at some length in our principal brief, it has been pointed out with great force that this private right of access cannot be destroyed without compensation; that it would be absurd to say that a private right is not infringed when a man who has been accustomed to enter his property from a highway finds his entrance made impassable; that the right to step from one's land onto a highway and *vice versa* is a right distinct from and in addition to the right to pass and repass along the highway.[3]

---

(1) Gould on Waters, 2d Ed., Par. 149, p. 304.

(2) Atty. Gen. vs. Conservators of the river Thames. 1 Hemming & Miller. 1.

(3) Lyon vs. Fishmongers Co., 1 App. Cas., 662.
Rose vs. Groves, 5 M. & G., 613.
Duke of Buccleugh vs. Board of Pub. Works, L. R., 5, H. L. 418.
Met. Board of Works vs. McArthur, 7 H. L. Law Rep., 243.
Caledonia Ry. Co. vs. Ogilvy, 2d Macq. Sc. App., 229.
Montreal vs. Drummond, 1 App. Cas., 384.
Bell vs. Quebec App. Cas., 8497, 2 L. R., 305.

The distinction is between the right of access from one's land to the highway and the power to complain of an obstruction to his progress in the highway after he gets upon it. The latter affects his enjoyment of a public right, while the former is a private right, incident to the upland and constituting a part thereof. When he is once upon the highway he is a traveler like the rest of the public, and any injury suffered affects him in common with all others similarly situated.[4]

This Court has said that this riparian right of access is a valuable property right and cannot be capriciously destroyed or abridged; a right which, when once vested, cannot be taken from the owner except in accordance with established law, and upon payment of due compensation.[5]

We have discussed in our former brief some of the cases which, it seems to us, recognize clearly that the right of access is a form of the enjoyment of the upland and that it constitutes a part of the land itself.

Property need not be taken in the literal sense in order to entitle the owner to compensation.

Any serious interruption in the common and necessary use of the property may be such a taking as will entitle the owner to compensation.[6]

The riparian proprietor has the right to make a landing wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public.[7]

---

(4) Gould on Waters, Par. 124, 148 et seq., p. 245.

(5) Yates vs. Milwaukee, 10 Wall., 497, and cases cited on page 19 of our principal brief.

(6) Pumpelly vs. Green Bay, etc., Co., 13 Wall., 166.
Crocker vs. N. Y., 15 Fed. Rep., 405.
Cooley's Const. Lim., 6th Ed., p. 670, and note 3.

(7) Dutton vs. Strong, 66 U. S., 1 Black, 25 (17 L., ed. 29); St Paul & P. R. Co. vs. Schurmeier, 74 U. S., 7 Wall., 272 (19 L., ed. 74); Atlee vs. Northwestern U. Packet Co., 88 U. S., 21 Wall., 389 (22 L., ed. 619); Gould on Waters, 278.

The owner can be deprived of his right of access only in accordance with established law; and, if necessary that it be taken for public use, upon due compensation.[8]

This does not include the right to redress for an obstruction not against the front of the plaintiff's land, even when it entirely closes the highway.[9]

II.

The power of Congress to regulate navigable waters under the commerce clause of the Constitution was the subject of discussion in South Carolina vs. Georgia, 93 U. S., 4, and Gilman vs. Philadelphia, 3 Wall., 724. It was said in those cases that the power vested in Congress by the Constitution was the same power which the States possessed before the adoption of that instrument, and which was possessed by the English Parliament before the Revolution. During the colonial period the English Parliament exercised complete control over navigable waters, and in the exercise of this power might take private property without compensation. The colonies, after the separation, succeeded to whatever powers Parlia-

(8) Weber vs. State Harbor Comrs., 85 U. S., 18 Wall., 57 (21 L. ed. 798); Atlee vs. Northwestern U. Packet Co., 88 U. S., 21 Wall., 389 (22 L. ed. 619); Richardson vs. Boston, 65 U. S., 24 How., 188 (16 L. ed. 625); Baltimore & O. R. Co. vs. Chase, 43 Md., 23; Harrison vs. Sterrett, 4 Har. & McH., 540; Diedrich vs. Northwestern Union Co., 42 Wis., 248; Delaplaine vs. Chicago & N. W. R. Co., Id., 214; Meyers vs. St. Louis, 8 Mo. App., 266; Barron vs. Baltimore, 32 U. S., 7 Pet., 243 (8 L. ed. 672); Clark vs. Peckham, 10 R. I., 35, 9 R. I., 455; Morrill vs. St. Anthony Falls Water Power Co., 26 Minn., 222; Norfolk vs. Cooke, 27 Gratt., 430, 435.

(9) Baily vs. Phila., W. & B. R. Co., 4 Harr. (Del.), 389; Boston & W. R. Corp. vs. Old Colony R. Corp., 12 Cush., 605.

ment had possessed; and upon the formation of the Federal Government, Congress succeeded to whatever powers the States had possessed, subject, however, to this important qualification: That in the exercise of the powers delegated to it (and included herein the power granted by the commerce clause), Congress is subject to whatever limitations are created by other parts of the same instrument. In extending its control to navigable waters, therefore, Congres, unlike the colonies and Parliament before it, is subject to the provision that private property cannot be taken for a public purpose without compensation. This has been expressly asserted in Monongahela Navigation Co. vs. U. S., 148 U. S., 312, where it was said that Congressional control over this subject was no greater than its power to establish postoffices and postroads, and that when acting in relation to either subject Congress was limited by the provisions of the Fifth Article of the Constitution.

Not only is it true that Congress in its control of navigable waters has only that power which was originally possessed by the States, qualified as pointed out above, but so long as Congress does not choose to act in relation to this subject, the individual States may still exercise the same power to the same extent and subject to the same limitations as are imposed upon its exercise by Congress. This power being the same whether exercised by Congress or by the States, it will be important to ascertain what limitations upon it the courts have held to exist when exercised by the States. The cases are numerous which hold, first, that property rights cannot be destroyed without compensation, and, second, that the right of access is a valuable property right which cannot

be destroyed or abridged except upon payment of compensation to the owner.[10]

The Supreme Court of Michigan passed upon the question in Maxwell vs. Bay City Bridge Co., 46 Mich., 278. The plaintiff there was the owner of riparian property upon the Saginaw River, across which a bridge was constructed by the municipality under authority from the State. The structure was placed, not in front of plaintiff's property, but at a very short distance from it, so that a pier for the draw or swinging portion of the bridge extended opposite his wharf and at such a short distance as to make access thereto difficult. The same case was previously in the same court, and is reported in 41 Michi-

(10) *England.* Lyon vs. Fishmongers' Co., L. R., 1 App., 662, 46 L. J., Ch. 68, 35 L. T., N. S., 569, 25 W. R., 65; Little vs. Dublin, Etc., Ry. Co., 7 L. R., C. L. 82; Reg. vs. Ry. Co., 2 Eng. Ry. & C. Cas., 1.

California. Shirley vs. Bishop, 67 Cal., 543.

Connecticut. State vs. Sargent, 45 Conn., 358.

Illinois. Chicago vs. Laflin, 49 Ill., 172.

Iowa. Musser vs. Hershey, 42 Iowa, 356; Grant vs. Davenport, 18 Ia., 179; Renwick vs. Davenport R. Co., 49 Ia., 664.

Maryland. Garrite vs. Balto, 53 Md., 422; Balto, Etc., R. Co., vs. Chase, 43 Md., 23.

Massachusetts. Drury vs. Midland R. Co., 127 Mass., 571.

Minnesota. Carli vs. Stillwater, Etc., 28 Minn., 373; 41 Am. Rep., 290; Union Depot, Etc., Co. vs. Brunswick, 31 Minn., 297; 47 Am. Rep., 789.

Missouri. Myers vs. St. Louis, 82 Mo., 367.

New York. Steers vs. Brooklyn, 101 N. Y., 51; Langdon vs. N. Y., 93 N. Y., 129.

Pennsylvania. Rose vs. Slack, 2 Whart (Pa.), 538; 30 Am. Dec., 278.

Rhode Island. Clark vs. Peckham, 10 R. I., 35; 14 Am. Rep., 654.

Wisconsin. Diedrich vs. S. W. Union R. Co., 42 Wis., 248; 24 Am Rep., 397; Delaplaine vs. Chicago, Etc., R. Co., 42 Wis., 214; 24 Am. Rep., 386; Boorman vs. Sunnuchs, 42 Wis., 233.

gan, 453, where the location of the bridge and the riparian property is well shown in a diagram. No damages were claimed for the occupation of the bed of the stream, but for the interference with the right of access. It was held by that Court that although the bridge was properly there by the authority of the State, the plaintiff was nevertheless entitled to recover for the injury resulting from the abridgment of the right of access. The Court say: "Neither the Supervisors nor the State can directly or indirectly appropriate plaintiff's use of the shore to public uses without compensation; and if even a lawful bridge and pier is constructed so near it as to preclude its profitable use he is entitled to compensation. If the bridge and pier is far enough from the dock so that it may be used but only with inconvenience, the same principle applies, and the question is merely of the extent of the injury."

It will be noted that in this case there was no physical invasion of the property, but merely a permanent interruption of the access to the shore from the stream and *vice versa*.

The question has frequently been raised in reference to the right of access to public streets.

In Indiana vs. Eberle, 110 Ind., 542, 59 Am. Rep., 225, the Court said: "Nothing is better settled in this State than that the owners of lots abutting on a street may have a peculiar and distinct interest in the easement in the street in front of their lots. This interest includes the right to have the street kept open and free from any obstruction which prevents or materially interferes with the ordinary means of ingress or egress from the lots. It is distinguished from the interest of the general public in that it becomes a right appendant and legally adhering to the contiguous grounds, and the improvements thereon, as the owner may have adapted them to the

street. To the extent that the street is a necessary and convenient means of access to the lot, it is as much a valuable property right as the lot itself.

Nor can the streets be invaded so as to inflict special and peculiar damage or injury upon the adjacent lot owner's property, without rendering the wrong-doer liable for such damage. * * * The interest in the street which is peculiar and personal to the abutting lot owner, and which is distinct and different from that of the general public, is the right to have free access over it to his lot and buildings substantially in the manner he would have enjoyed the right in case there had been no interference with the street. The right of access by way of the street is an incident to the ownership of the lot, which cannot be taken away or materially impaired without liability to the owner to the extent of the damage actually incurred."

In Denver vs. Bayer, 7 Colo., 113, the Court said: "No good reason is observed for discriminating against the easement in a street connected with the lot of an abutting owner. We are disposed to say that it is property within the meaning of our Constitution, and any interference therewith which results in injury to the realty must, with the exceptions hereinafter stated, be justly compensated; if in such a case there is no technical 'taking' of private property, there is a damaging thereof within the constitutional inhibition. Whatever permanently prevents the adjacent owner's free use of the street for ingress or egress to or from his lot, and whatever interference with the street permanently diminishes the value of his premises, is as much a damage to his private property as though some direct physical injury were inflicted thereon."

III.

The doctrine that the right of access may be temporarily interrupted for the purpose of repairing or improving the highway is not inconsistent with the doctrine so generally laid down that the destruction of this right entitles the owner to damages. If it is the duty of the government to maintain the highway, it must be also its right to repair and improve it. If the highway cannot be repaired without excluding all persons from traveling upon it, the adjoining owner may also be excluded in the manner and to the extent reasonably necessary. If it is necessary to close the highway entirely, this does not entitle the adjoining owner, who by reason of his location suffers greater inconvenience than a neighbor whose land is at some distance from the obstruction, provided the highway is closed no longer than is reasonably necessary to complete the repairs or the improvement. The closing of the highway is presumably for the purpose of improving it and if one in the immediate neighborhood of the obstruction suffers greater inconvenience than others, he will correspondingly receive greater benefits when the highway is opened again in its improved state. The government would not be authorized, however, in closing the highway permanently, thereby depriving the adjoining owner of ingress and egress for all time.

The case of Northern Transportation Co. vs. Chicago, 99 U. S., 635, was a case where there was a temporary interference with the right of access, made necessary by the construction of certain improvements in LaSalle street in Chicago. It was said in that case that since it was the duty of the city authorities to care for and repair highways, the State must be deemed to have an easement to

repair and improve the street over its entire length and breadth, to adapt it to easy and safe passage. So long as the improvements were made with due care and skill no damages would be allowed. As was said in that case: "No entry was made upon plaintiff's lot. All that was done was to render for a time its use more inconvenient. * * * It is insisted, however," the opinion continues, "that the plaintiffs may recover for the obstruction of the access to their lot, caused by the coffer dam in the river. It is admitted that the dam was necessary to enable the city to construct the tunnel under the river; and it is not complained that it is unskillfully built, or that it was kept in the stream longer than the necessities of the work required. * * * In this case the coffer dam was only a temporary obstruction. It was no physical encroachment upon the plaintiff's property, and it was maintained only so long as it was needed for the public improvement. We cannot doubt that it was lawfully placed where it was, and having thus been, that the city is not responsible in damages for having erected and maintained it while discharging the duty imposed by the Legislature, the obstruction not having been permanent or unreasonably prolonged."

From this decision it is evident that damages were denied because, first, the obstruction did not constitute a physical invasion of plaintiff's lot; and, second, it was not unreasonably prolonged. It follows as a logical consequence from this reasoning that if the obstruction had been upon the land itself, or, not being upon the land, if it had been permanent in character instead of being temporary and not unreasonably prolonged, damages would have been allowed.

The doctrine then would be that without a physical invasion, no damages can be recovered for consequential injuries to property unless the obstruction is maintained

an unreasonable length of time. As soon, however, as the obstruction is maintained an unreasonable time it becomes *quo ad hoc* permanent in character and therefore unlawful. In the case under consideration, Transportation Co. vs. Chicago, damages were denied, not on the ground that the injuries were consequential, but because the interference was temporary. Had the obstruction been permanent the injury would have been no less consequential, and yet the plaintiff would have been entitled to recover. Whatever rights the adjacent owner has in the street whether he has them by virtue of his ownership of abutting property or simply from the fact of his being a member of the public, are subject to temporary interruption on the part of the public by the exercising of the easement to repair and improve the highway. This easement of the public authorities, however, is again limited by the requirement that those rights must not be interrupted for a longer time nor to a greater extent than the necessities of the case require.

The doctrine that an obstruction in a highway necessary for repairs or improvements, which does not encroach upon an adjoining owner's land and which is not maintained longer than is reasonably necessary, is not a nuisance, was recognized at the common law. It was discussed in Wilkes vs. Hungerford Market Co., 2 Bingham, 281, decided in 1835. There the plaintiff was allowed to recover damages for an injury to his business caused by the maintenance of an obstruction in a highway for an unreasonable length of time. The plaintiff in this case was a bookseller on a highway, whose damage consisted in the loss of custom by the interruption of his patrons' access to his shop.

This case distinguishes clearly between the injury to the right of passing and repassing upon the street, on the

one hand, and the injury suffered by an adjacent owner whose access to his property is cut off or destroyed. The plaintiff in that case did not ask damages for being prevented from passing and repassing upon the highway in the usual manner, which was an injury suffered by him in common with all others, but for the interruption of the access to his land. Tyndal, C. J., held that even this right may be interrupted when necessary for the repair or improvement of the highway, provided the interruption is not continued an unreasonable length of time; but for an interruption which is continued for a time longer than was required by the necessities of the case, an action would lie. This is an injury suffered in addition to that which is suffered by the public at large. "The injury to the subjects in general, is that they cannot walk in the same track as before; and for that alone an action on the case would not lie; but the injury to the plaintiff is the loss of a trade, which, but for this obstruction to the general right of way, he would have enjoyed; and the law has said from the Year Books downwards that if a party has sustained any peculiar injury, beyond that which affects the public at large, an action will lie for redress." "The plaintiff, in addition to a right of way which he enjoyed in common with others, had a shop on the road side, the business of which was supported by those who passed; all who passed had the right of way; but all had not shops." Bosanquet, J., said: "The injury of which the plaintiff complains is, injury to his business as a shopkeeper; he does not complain of being stopped in passing and repassing as others have been stopped; but that by the obstruction in question persons who frequented his shop have been prevented from approach. * * * For the mere act of obstruction in passing and repassing the plaintiff could not have sued, nor could his tenants them-

selves as mere occupiers; but the foundation of the action was, though it rested on an obstruction to passing and repassing, the injury occasioned to the plaintiff by the deterioration of his property."

That case discusses also some of the prior decisions of the English courts, and the result there arrived at is in harmony with the more recent decisions cited in our main brief, in which the right of access to navigable water is held to be a valuable property right, which its owner possesses in addition to his right to pass and repass upon the stream after getting upon it in common with other members of the public, and a right of which he cannot be deprived without compensation.

This doctrine that the right of access is subject to temporary interruption to the extent and for the time reasonably necessary for repairs or improvements illustrates what was said in the English case of Lyon vs. Fishmongers' Company, elsewhere referred to, that the right of access is controlled but not extinguished by the public right of navigation.

The easement to repair or improve the highway can never serve as a justification for the permanent destruction of the right of access or for even a temporary interference with it to any extent not required by the necessities of the case.

IV.

We have endeavored to show that the right of access, constituting as it does, a part of the upland, cannot be appropriated without compensation. Even though this were not true, any interference on the part of Congress,

not reasonably necessary for the accomplishment of a lawful purpose, would still be unlawful.

There is another aspect of the present case which it is unnecessary to discuss, provided our argument so far is conceded to be sound. But granting, solely for the purpose of the argument, that Congress could erect the pier in question and permanently interfere with plaintiff's access, it could do so to no greater extent than the purpose for which the pier was erected and which is relied upon as a justification, required.

It appears that the pier constructed by the Government across the front of plaintiff's land is permanent in character, and extends several feet above the surface of the water; that it is about fifty feet in width, and completely destroys plaintiff's access to the navigable part of the stream except by passing over it or over the submerged land of his neighbors. The construction of the pier itself does not work the legal injury and ouster of which the plaintiff complains; but it is the assertion by the defendant that the Government in constructing the pier, and deepening the water to the northward thereof, thus widening the naturally deep channel of the stream, acquired the right to exclude the plaintiff from approaching the pier on either side thereof, and going across it for the purpose of enjoying his right of access to and from his land. By the dredging, the area of navigable water in front of plaintiff's land was largely increased, and the part dredged, became a part of the navigable channel. The record discloses an absolute refusal on the part of the defendant to permit plaintiff to cross this pier in the exercise of his right of access and an assertion by the defendant of the absolute use and possession thereof for all purposes. This marks the distinction which clearly exists between the case at bar and any of the former decisions of this Court. A statement

of my understanding of the law applicable to this point, will make clear our position.

First. Conceding for the purposes of the argument that the riparian owner's title to the submerged land is qualified by and subject to the public right of navigation, and to the interference with the exclusive occupation thereof by him, by the exercise of the powers of the general Government to improve the navigability of the stream for the purposes of commerce and navigation, still that does not furnish a defense in this case. The right of access owned by the plaintiff as pointed out in the main brief does not spring from the plaintiff's ownership of the submerged soil, but is appurtenant to, and is a form of enjoyment of the upland, wholly independent of the general right of navigation which the owner has, as one of the general public. The extent to which this right of access is qualified by the right of navigation is stated by the Lord Chancellor in Lyons vs. Fishmongers Company, as follows: "I cannot entertain any doubt that the riparian owner on a navigable river in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights of access as an ordinary riparian owner, underlying and controlled by, but not extinguished by the public right of navigation."

Second. Applying the doctrine just stated to the case at bar, I reach this conclusion, namely: Even granting that the Government had the lawful right to construct the pier in question, and deepen the stream and widen the navigable part thereof by dredging, as a part of the improvement, and to maintain the same for the public purposes stated, and in the construction and maintenance of the pier to interfere with the plaintiff's right of access to navigable waters, it could do so only to such an extent as was reasonably necessary for the purposes

of trade and commerce and navigation, and no further; that it is a necessary qualification and limitation to the right of the Government to interfere with the enjoyment by the owner of his riparian rights without making him compensation, that they shall only do so to the extent necessary for the enjoyment of the easement asserted by the government for the public use of commerce and navigation. The defendant had no right to prevent the plaintiff from crossing the pier in question, or to use it from time to time in connection with his upland, provided such crossing and such use did not unreasonably interfere with the public right of navigation and the legitimate use of the pier for trade and commerce. It could hardly be pretended, and never has been claimed, that the plaintiff might not make use of the pier by crossing it from time to time, or by transporting a cargo across it to his own land, if such use did not interfere with the navigation by the public of the deep water which lies between the pier in question and the non-navigable water to the northward of it. The plaintiff would have a right to construct a wharf from his upland to the south side of the pier in question, and use it in connection with his land, and in connection therewith use the pier in front of his wharf for the purpose of mooring his vessels, or of loading, or unloading the cargoes thereof, to the full extent that it did not interfere with the public right of navigation. The fact that the pier has been placed there by the government as an artificial border to the navigable channel, cannot be held to destroy the right to land as it exists at common law, and can only be held to qualify or limit that right of landing to the extent that such use might interfere with the public right of navigation, trade and commerce.

If such use of the pier, or the mooring of vessels thereat, did not interfere with the public right of navigation, it would seem a most extraordinary thing that the govern-

ment would be permitted to arbitrarily refuse to plaintiff the enjoyment of his right of access, because in so doing he would have to cross the pier.

This view of the law was accepted by the Circuit Court for the District of Maryland, in the Edmondson Island case, 42 F. R., 15. The United States Government had constructed a lighthouse on the submerged land, having obtained the title in fee from the owner of the piece of land on which the lighthouse was constructed. The government had also obtained a lease for a term of years for a portion of the island for the use of the Fish Commission, and had, by artificial construction, extended the piece so leased out into the water. As a part of the construction certain cribbing and filling in was done, which served the double purpose of protecting the premises of the Fish Commission and the lighthouse proper from injury from the floating ice in the Susquehanna river. Such cribbing was, in fact, necessary for those purposes. After the expiration of the lease the government removed the Fish Commission buildings onto the artificially made extension, claiming that it became government property, and that it had a right to the exclusive occupation thereof, including the cribbing. In an action of ejectment brought by the owner of the island to obtain possession of the addition, the government defended upon the ground that the construction of the cribbing was done in the exercise of the power of the government under the Interstate Commerce Clause for the improvement of the navigable channel, and for the purposes of trade and commerce; and it was contended that such cribbing and structure being necessary for the protection of the lighthouse and for the purposes of improving the navigation of the stream, and in furtherance of trade and commerce, the United States was entitled to the exclusive enjoyment thereof, and that the owner of the land did not have the

right to cross the same from his land to the water for the ordinary lawful purposes. With reference thereto, the Court says as follows:

"But these structures, although built under the direction of the engineers in charge of the improvement of the navigable channels of the Chesapeake, and of the officials in charge of the maintenance of the lighthouse, were constructed primarily to facilitate the purposes of the Fish Commission, and so far as they are now used, in the sense of being occupied and held in exclusive possession, they are used solely by the Fish Commission. The houses removed from the other portions of the island at the termination of the lease, and re-erected on this new-made area, have no use whatever in connection with the lighthouse, or with commerce and navigation. It was held by this court in the Hawkins Point Light House Case, 39 Fed. Rep., 77, that the United States might erect a necessary lighthouse in a navigable stream in front of the land of a riparian proprietor who had not only the rights which the Maryland law of 1862 had given him as a riparian proprietor, but had also a patent from the State for the submerged land itself, without making him any compensation. *But it is a necessary qualification of that rule that the United States can exclude the owner without making him compensation to no greater extent than is reasonably necessary for the maintenance of the lighthouse; and that the United States would have no right to forbid such an owner from making any use of the premises which did not interfere with the easement asserted by it for the public use of commerce and navigation.*

"If, for example, the riparian owner had, under the State law, an exclusive right to plant and take oysters in the waters surrounding the lighthouse, he could do so, unless it was injurious to the lighthouse structure, or interfered with navigation; but the United States could not

exclude him from that privilege upon the ground that it interfered with the lighthouse or navigation and grant the same privilege to the Fish Commission. So in this case, if these structures are such that, if made by any private person, they would become appurtenant to the island and belong to the owner of it, if the United States justifies the construction of them on the ground that they are aids to commerce and navigation, it can only exclude the owner of the island from them to the extent required by the use which is relied upon as the justification of their construction. After erecting the lighthouse upon the parcel 45 feet square, to which the United States acquired title by deed, it might have discovered that the safety of the lighthouse required that a heavy wall should be built out in the water so as to surround the island. If such a wall had been built, could it be contended that the United States might say to the owner of the land, 'You must not make any use of the wall for landing or drawing seines, because it is injurious to the structure,' and then proceed to grant that privilege to the Fish Commission."

The doctrine is well stated in this case in that part of the decision where it is said:

"If the United States justifies the construction of them (the structures) on the ground that they are aids to commerce and navigation, it can only exclude the owner of the island from them to the extent required by the use which is relied upon as the justification of their construction."

In that case the government could not have justified the erection of the structures on the ground that they were necessary for the use of the Fish Commission; and it appearing that they might be used by the Fish Commission while serving the purpose for which alone they could have been lawfully placed there, the government could not exclude the owner of the island from using them for the

same purpose, or for any purpose or in any manner which did not interfere with that use by the government which justified their construction, that is, the improvement of commerce and navigation.

The same doctrine is laid down in Hawkin's Point Light House, 39 Fed. Rep., 77, where it was held that the government can exclude the owner of the submerged land without compensation to no greater extent than is reasonably necessary for the purpose which justifies his exclusion at all; and that the owner might make any use of the premises which does not interfere with the easement asserted by the government for the purpose of regulating commerce and navigation. If this is true with regard to the exculsion of the riparian owner from the submerged land, which it is conceded may be occupied by Congress for purposes of commerce, without compensating the owner, it would for stronger reasons apply to the exclusion from the valuable property right of access.

V.

The principle that property rights shall not be disturbed to any greater extent than the necessities of the case require is well recognized, even where property is taken under the power of eminent domain and full compensation made to the owner.

The limitation upon the power to take private property for public use under the power of eminent domain is stated by Cooley, in his Constitutional Limitations, 6th Ed., pp. 664-5, as follows:

"The taking of property must always be limited to the necessity of the case, and consequently no more can be appropriated in any instance than the proper tribunal shall adjudge to be needed for the particular use for which

the appropriation is made. When a part only of a man's premises is needed by the public, the necessity for the appropriation of that part will not justify the taking of the whole, even though conpensation be made therefor. The moment the appropriation goes beyond the necessity of the case, it ceases to be justified on the principles which underlie the right of eminent domain."

If the appropriation of private property to an extent not required by the necessities of the occasion cannot be justified, even where what is taken is paid for, it requires little reflection to perceive how much more this would be true where no compensation is made at all.

If the use of the pier in question by the plaintiff does not interfere with the purpose for which it was erected, viz: the improvement of navigation, it is not apparent what warrant or authority there could be for refusing him the right to cross it for the purpose of reaching his land. It could not be justified on the ground that it was necessary to protect the artificial channel, because it nowhere appears it was necessary or that the pier would not serve that purpose if plaintiff were permitted to cross.

Where an officer of the Federal Government is sued in ejectment and seeks to justify under an authority from the United States, he must show that his authority extends that far. If the agents of the government build a pier and exclude the riparian owner from crossing it, on the ground that it was necessary for the improvement of commerce and navigation, they must show that it was necessary. It appears nowhere in the record that the crossing of the pier by the plaintiff interfered with the purpose for which it was erected. On the contrary, it appears otherwise. The pier is placed at one edge of the channel, leaving a broad expanse of navigable water between it and the opposite pier.

If this view of the law is correct, and it is true that

plaintiff is entitled to cross the pier for the purpose of reaching navigable water provided his doing so does not interfere with that use by the government which justifies its construction, then whether or not its use by the plaintiff would interfere with the navigation of the stream at this point, would be a question of fact to be determined by a jury, and it would be error for a Court to determine this question adversely to the plaintiff as a matter of law.

We think that the plaintiff was at least entitled to have this question determined by a jury sworn to investigate the facts; and in case it was found that this use of the pier by plaintiff was not an unreasonable interference with the purpose for which the pier was constructed, i. e., the improvement of navigation, he was certainly entitled to the enjoyment of it.

VI.

The action of ejectment is the proper remedy for the enforcement of the right of access and to prevent the interruption or destruction thereof. This was the form of action in the Edmondson Island Case, 42 Fed. Rep., 15, discussed above.

It was there held that the title to the locus in quo was in the riparian owner subject to certain easements on the part of the Government. So long as the Government kept within the limits of the authority under which it might occupy the submerged soil, its possession was lawful. As soon, however, as the Government exceeded those limits, its possession was wrongful and the riparian owner was entitled to proceed in ejectment. In that case the exclusive use of the government structures for

the purposes of the Fish Commission was held to be without justification and although the structures were originally built for a lawful purpose, the plaintiff was held to have rightly brought his action in ejectment.

To the same effect are Adams vs. Emerson, 6 Pick., 57; Robbins vs. Borman, 1 Pick., 122; Perley vs. Chandler, 6 Mass., 454.

In the case at bar the occupation of plaintiff's submerged land for the purpose of excluding him from the enjoyment of his riparian right of access to any extent not necessary for the purpose of improving the navigability of the stream would make the occupation unlawful and render the defendant liable to a suit in ejectment.

If plaintiff's right of access can be utterly destroyed in any case without compensation, even where necessary for the improvement of trade and commerce, a proposition which appears to have been negatived repeatedly by our courts, we urge that this Court ought not to hold that it may be so destroyed where no necessity is shown to exist.

Respectfully submitted,

JOHN C. DONNELLY,

Counsel for Plaintiff.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

GILMORE G. SCRANTON,
Plaintiff in Error,
vs.
EBEN S. WHEELER.

No. 49.

In Error to the Supreme Court of the State of Michigan.

Brief for Plaintiff in Error upon Argument.

HARLOW P. DAVOCK,
Counsel for Plaintiff in Error.

I.

The attention of the Court is called to the fact that this is an action of ejectment, and under the law of the State of Michigan, after a final judgment shall be rendered, at any time within three years, the parties against whom same was rendered may, upon proper application, apply for a new trial.

Therefore, it is suggested that this Court, upon making its decision, should remand the case to the Circuit Court for the County of Chippewa, State of Michigan, where the proceedings in this cause originated.

II.

Upon the argument of this cause, Mr. Justice White referred to the fact that the United States refused to permit anyone to pass over or to have access to the jetties at the mouth of the Mississippi River.

Having formerly been a civil engineer in the employ of the United States Engineer Corps, and having inspected the Eads jetties, so called, during the progress of their construction, I desire to make a brief statement of their physical surroundings.

The uplands of the Mississippi River practically terminate at Forts St. Phillips and Jackson, and below this, extending down to twenty miles at the head of the passes, and thence a distance of twelve or fifteen miles to the Gulf itself, is the delta of the Mississippi River, so called. At the head of the passes the river spreads itself like a root of a tree, or the extended fingers of a hand, forming the Southwest pass, the South pass, the East pass, pass a la Loutre, etc. These passes, bordered with a narrow fringe of marshy land, are from twelve to fifteen miles in length, and terminate in the Gulf of Mexico. The Eads jetties at the mouth of the South pass were expressly designed and built to confine the discharge of the water so that it would scour out the bar found at the outlet of the river.

See report of Chief of Engineers, U. S. A., 1897. Charts of South Pass, Part II., 749. Also Ex. "X," filed herein.

As can be readily seen, being miles away from any upland, there could not be any riparian rights present, no private interests could be injured in connection with the peculiar construction required, and there being an absolute necessity of the jetties being kept intact, the most stringent regulations were necessary for their care.

The Supreme Court of the State of Michigan, when the State in 1895 by enactment set aside certain submerged lands in Lake Erie for public shooting grounds, making it lawful to destroy the rushes and other submarine vegetation on such lands, said it was not unconstitutional, in that it deprived the riparian owner of property rights without due notice and compensation. That the fee of the soil lying beneath the waters of the great lakes were in the State and the right of the riparian owner limited to the enjoyment of such easements as were at common law incident to the ownership of land bordering upon navigable streams.

People vs. Silberwood, 110 Mich., 103.

But in this case, before this Court, the upland was situated upon the banks of the St. Marys River, the improvement made, although desirable, not only was not absolutely necessary, but was one which, when made, was entirely different and governed by rules not applicable to those existing at the mouth of the Mississippi River or upon the great lakes, of which Lake Erie is one.

Even the building of the pier itself was not absolutely necessary. The channel, when dredged, could have been staked out and vessels thus could as easily as now have avoided making the swing around the curve of the old South pier. If the pier was built so as to allow vessels to tie up and await their passage through the canal lock a mile below, it was valuable as a docking privilege alone, and the property of the plaintiff should not be taken for public use without just compensation, and there was no absolute necessity for either the building of the pier or of destroying the plaintiff's right of access thereby.

HARLOW P. DAVOCK,
Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

GILMER G. SCRANTON, PLAINTIFF in error, v. EBEN S. WHEELER. } No. 49.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF FOR DEFENDANT.

STATEMENT.

The plaintiff, who is the plaintiff in error, brought an action in ejectment in the circuit court of the county of Chippewa, State of Michigan, to recover from the defendant possession of "an undivided one-half interest, or portion of, in and to private land claim number three, Whelpley's survey, in the village of Sault Ste. Marie, Michigan, including therein that portion of the land

beneath the water of St. Mary's River from the river bank on said lot to the thread of the stream of said river, which forms a part of said lot, and all riparian rights belonging and attached thereto and being a part thereof, which said premises the said plaintiff claims in fee."

For many years prior to 1850 the lands at Sault Ste. Marie, in part at least, were occupied by parties who had no legal title thereto, but claimed equitable rights by virtue of long-continued possession. The lands were lands of the United States, and repeated but unsuccessful attempts were made by these occupants to obtain recognition of their rights from Congress.

In 1850, however, Congress passed an act (9 Stats., p. 469, c. 71) which provided that the register and receiver of the land office at Sault Ste. Marie should be empowered and authorized to examine and report upon claims to lots at Sault Ste. Marie, according to the provisions of the act, and pursuant to instructions of the Commissioner of the General Land Office.

The second section of that act provides that—

> The said Commissioner shall cause the register and receiver to be furnished with a map, on a large scale, of the lines of the public surveys at the Sault Ste. Marie, and it shall be the duty of the Secretary of War to direct the proper military officer, on application of the register and receiver, to designate, or cause to be designated, upon the map aforesaid, the position and extent of lots necessary for military purposes, as also the position and extent of any other lot or lots which may be required for other public purposes, and also the position and extent of the Indian agency tract and of the Indian reserve.

Section 7 of the act provides that on the completion of certain preliminary maps and abstracts by the land officers the surveyor-general at Detroit shall dispatch a skillful deputy to the Sault Ste. Marie, and that—

> he shall proceed forthwith to lay off and survey the village of Sault Ste. Marie in town lots, streets, avenues, public squares, outlots, having regard to the lots and streets already actually surveyed, existing, or established, and having regard also to the existing limits and extent of lots covered by the claims which shall have been adjudicated by the register and receiver; and after such surveys shall have been completed the aforesaid deputy shall prepare a plat exhibiting, in connection with the lines of the public surveys, the exterior lines of the whole village, also the squares, individual lots, and the public lots, and also the outlots, designating the lots reserved for military and other purposes, according to the extent and limits of the same as fixed by the proper military officers pursuant to the requirements of the second section of this act, and specifying the name of each claimant of the individual lot and whether confirmed or rejected, the sum assessed by the register and receiver as a payment which should be made in each case by the party; * * * and it shall be the duty of the aforesaid deputy to return to the register and receiver their abstracts and map, and to submit to them his plat of the actual surveys, and if they shall be satisfied that it is in accordance with their adjudications they shall append a certificate to that effect, and the said deputy shall then transmit the said plat with the field notes to the surveyor-general at Detroit for examination of the work.

Thomas Whelpley was appointed deputy surveyor. He made the survey of private land claim No. 3 in 1854–55.

The plat and field notes were approved by the surveyor-general at Detroit, September 4, 1855. The claim was confirmed to Samuel Peck and the heirs of Franklin Newcomb in 1855, and patented to them October 6, 1874. From these plaintiff derives title, which is undisputed. By the field notes private claim No. 3 was described by metes and bounds, and one boundary was "along the right bank of the Ste. Marie River." The patent follows the description of the survey.

The St. Mary's River is a river or strait connecting the waters of Lakes Superior and Huron. It forms a part of the international boundary between the United States and the Dominion of Canada. It is a navigable stream. It and its connecting waters form a great and important highway for interstate and international commerce.

About 8 miles below where this river emerges from Lake Superior commence falls or rapids, which interfere with and obstruct navigation, continuing for three-fourths of a mile, in which distance the river falls 18 feet. By an act of Congress approved August 26, 1852 (10 Stat., 35, c. 92), there was granted to the State of Michigan the right to locate a canal through the military reservation at this locality, and 400 feet of land in width, extending along the line of said canal, was granted for its construction and convenience, to be located under the approval of the Secretary of War; and 750,000 acres of public lands were granted to the State to aid in constructing and completing said canal. The site selected was approved in 1853 by Jefferson Davis, then Secretary of War. The canal was begun in 1853 and com-

pleted as originally constructed in 1855, and was built entirely within the reservation. Piers were extended into the water from the west end of the canal, curving northward, the south pier being in front of that portion of land claim No. 3 now in controversy, but leaving a riparian frontage of about 300 feet open to deep water.

The United States has, from the institution of this work, recognized its national character, Congress having frequently made large appropriations for its construction, repair, preservation, and completion.

Act of July 11, 1870, 16 Stat., 224, c. 240;
Act of February 2, 1871, 16 Stat., 402, c. 34;
Act of June 23, 1874, 18 Stat., 238, c. 457;
Act of March 3, 1875, 18 Stat., 456, c. 134;
Act of August 14, 1876, 19 Stat., 136, c. 267;
Act of June 18, 1878, 20 Stat., 156, c. 264;
Act of March 3, 1879, 20 Stat., 369, c. 181;
Act of June 14, 1880, 21 Stat., 189, c. 211.

And the Secretary of War was authorized to accept, on behalf of the United States, from the State of Michigan the St. Marys Canal and the public works thereon.

Act of March 3, 1881, 21 Stat., 479, c. 136.

By the act of August 14, 1876, Congress appropriated the sum of $130,000, "to be expended under the direction of the Secretary of War." The plan of the work was adopted in the spring of 1877 by the United States engineers and the Secretary of War. The construction of the new south pier, the pier in question, was commenced in 1877 and completed in 1881. By the act of June 14, 1880 (above cited), the Secretary of War was authorized to accept, on behalf of the United States from

the State of Michigan, the St. Mary's Canal and the public works thereon. In 1881 the State transferred the canal to the United States (Howell's Stat., sec. 5502).

None of the fast land embraced within the limits of private land claim No. 3, as defined by the Whelpley survey, has been taken or occupied. The canal was built through the reservation, and if it infringes upon plaintiff's rights it is because the pier crosses more of his riparian frontage than did the pier which was there at the time of the confirmation of his title in 1855.

The defendant has no personal interest in the controversy, and is in possession of the pier in question simply as an employee of the United States, being the superintendent in charge of the canal.

Upon these facts the court directed a verdict for the defendant. The supreme court of Michigan affirmed the judgment entered upon that verdict. A writ of error has been taken to this court.

ARGUMENT.

I.

The supreme court of Michigan held that the United States Government took possession of the submerged land of the plaintiff for the purpose of erecting thereon piers in aid of the immense navigation upon the Great Lakes and the rivers connecting them, and that the improvements made were necessary to aid and protect this navigation. That this title to submerged lands along navigable waters and the right of access thereto are subject to the paramount right of the United States to use the land

in such manner as they shall determine to be necessary in aid of navigation, and this without compensation to the adjoining owner. This was and is the defendant's contention.

In Michigan the title to the submerged land is in the adjoining owner to the thread of the stream. But this ownership is limited by such rights as belong to the public at large to the navigation and such other use as appertains to the public over the water. (*Lorman* v. *Benson*, 8 Mich., 18; *Rice* v. *Ruddiman*, 10 id., 125; *Ryan* v. *Brown*, 18 id., 196.)

The United States has asserted no title to the soil of St. Marys River. When the revolution took place the people of each State themselves became sovereign, and in that character held the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the General Government. (*Martin* v. *Waddell*, 16 Pet., 367.) This doctrine applies in this country to all waters, navigable in fact, whether affected by the tides or not. And it is equally applicable to new States, which have the same rights, sovereignty, and jurisdiction over this subject as the original States. (*Pollard* v. *Hagan*, 3 How., 212; *Withers* v. *Buckley*, 20 How., 84; *Shiveley* v. *Bowlby*, 152, U. S. 1.)

In *Barney* v. *Keokuk* (94 U. S., 324, 338), Mr. Justice Bradley, speaking for the court, said:

> The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the

British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas, and under the like influence it laid the foundation, in many States, of doctrines with regard to the ownership of the soil in navigable waters above tide water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principles were laid down in *Martin* v. *Waddell* (16 Pet., 367), *Pollard* v. *Hogan* (*supra*), and *Goodtitle* v. *Kibbe* (9 How., 471). These cases related to tide water, it is true, but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of the *Genesee Chief* v. *Fitzhugh* (12 How., 443), has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tides, are in the strictest sense entitled to the denomination of navigable waters and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limit of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the States in which the lands were situated.

In the case of *Illinois Central Railroad* v. *Illinois* (146 U. S., 387, 435) the court said:

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters within the limits of the several States belong to the respective States within which they are found, with the consequent right to use or dispose of any portion when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the permanent right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. * * *
>
> When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country the limitation and all its incidents were discarded. So also, by the common law, the doctrine of the dominion over and ownership by the Crown of lands within the realm under tide water is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the Crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide.

And in the same case, in a dissenting opinion, it was said by Mr. Justice Shiras, speaking for the minority:

> The able and interesting statement, in the opinion of the majority, of the rights of the public in the navigable waters, and of the limitation of the powers of the State to part with its control over them, is not dissented from (p. 474).

And in that case the court clearly designated the character of this title and control by the State over these waters. The court said, page 452:

> It is a title different in character from that which the State holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose no valid objection can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the States. But that is a very different doctrine from the one which would sanction the abdication of the general control

> of the State over lands under the navigable waters of an entire harbor or bay or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public and which can only be discharged by the management and control of property in which the public has an interest can not be relinquished by a transfer of the property.

It is clearly established, then, that the proprietorship of the beds and shores of navigable waters in this country, and their control of those waters belong to the States in trust for the use of the people, especially the public use of navigation and commerce. We are treating this question now without reference to the constitutional provision of the power of Congress to regulate commerce. The States can relinquish this ownership by grants of parcels of these lands, by legislative action, to individuals. They may "resign to riparian proprietors rights which properly belong to them in their sovereign capacity." But in whatever form they part with any of the title, and whether by express grant or by statute or judicial determination they extend the ownership of lands upon streams to the shores and beds, even to the middle of the stream, this public right of use remains. The State can not free the lands from the trust for the public uses of navigation and fishery. That trust is permanent and subsists upon all submerged lands, whether the *title* is in the State or the individual. It matters not how the citizen derived title, by legislative grant or as an incident to riparian ownership. The public right can not be destroyed or diminished.

It follows, then, that the States, by virtue of their sovereignty, can exercise certain powers over navigable waters in aid of navigation. This, of course, upon the hypothesis that Congress has not legislated upon these matters. Among them are the improvement of navigable channels; the regulation of wharves, piers, and docks; the construction of dams and bridges across the navigable waters of a State; quarantine and inspection laws, and the policing of harbors.

In *Pollard* v. *Hagan* (3 How., 320) the court said:

> The right of eminent domain over the shores and the soil under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions; and they, and they only, have the constitutional power to exercise it.

Gilman v. *Philadelphia* (3 Wall.) was a case where an injunction was sought to prevent parties from building a bridge provided for by an act of the legislature of Pennsylvania, upon the ground, among others, that it would be an obstruction to the navigation of the river, and, as such, repugnant to the Constitution and laws of the United States, touching the subject of commerce. The court said:

> It must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation, as well as navigable waters. * * *
>
> It is for the municipal power to weigh the considerations which belong to the subject and to decide which shall be preferred, and how far either shall be made subservient to the other. The States have

always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the States shall be exerted within the sphere of the commercial power which belongs to the nation.

The States may exercise concurrent or independent power in all cases but three:

1. Where the power is lodged exclusively in the Federal Constitution.

2. Where it is given to the United States and prohibited to the States.

3. Where, from the nature and subjects of the power, it must necessarily be exercised by the National Government exclusively.

In *Pound* v. *Turck* (95 U. S., 459) the power of the States, in the absence of Congressional legislation, to build dams all the way across navigable rivers was affirmed. The court, citing and approving *Wilson* v. *Blackbird Creek Co.* (2 Pet., 245), *Gilman* v. *Philadelphia* (*supra*), and *Crandall* v. *Nevada* (6 Wall., 35), said:

> The present case falls directly within the principle established by these cases, and aptly illustrates its wisdom. There are, within the State of Wisconsin, and perhaps other States, many small streams navigable for a short distance from their mouths in one of the great rivers of the country by steamboats, but whose greatest value in water carriage is as outlets to saw logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature

> of the State may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter.

Mobile County v. *Kimball* (102 U. S., 691) was a case where the validity of an act of the legislature of Alabama "To provide for the improvement of the river, bay, and harbor of Mobile" was called in question, on the ground that it conflicted with the commercial power vested in Congress. The court sustained the act. To quote a portion of its language:

> Inaction of Congress upon subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done respecting them, but is rather to be deemed a declaration that for the time being, and until it seems fit to act, they may be regulated by State authority.
>
> The improvement of harbors, bays, and navigable rivers within the States falls within this last category of cases. The control of Congress over them is to insure freedom in their navigation, so far as that is essential to the exercise of its commercial power. Such freedom is not encroached upon by the removal of obstructions to their navigability or by other legitimate improvement. The States have as full control over their purely internal commerce as Congress has over commerce among the several States and with foreign nations; and to promote the growth of that internal commerce and insure its safety they have an undoubted right to remove

obstructions from their harbors and rivers, deepen their channels and improve them generally if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the General Government.

In *Escanaba Transportation Co.* v. *Chicago* (107 U. S., 678), which was a bill in equity filed to enjoin the city from obstructing the free navigation of the Chicago River, as it is alleged to have done by certain regulations as to the opening and closing of the bridges over the same, the court said:

> The Chicago River and its branches must therefore be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation. But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. * * * When its (the State's) power is exercised so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the State and the Federal Government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it as the supreme law of the land. But until Congress acts on the subject the power of the States

over bridges across its navigable streams is plenary. This doctrine has been recognized from the earliest period and approved in repeated cases.

In *Huse* v. *Glover* (119 U. S., 543) the court, by Mr. Justice Field, speaking of this State control, said:

> The State is interested in the domestic as well as in the interstate and foreign commerce conducted on the Illinois River, and to increase its facilities, and thus augment its growth, it has full power. It is only when, in the judgment of Congress, its action is deemed to encroach upon the navigation of the river as a means of interstate and foreign commerce that that body may interfere and control or supersede it. If, in the opinion of the State, greater benefit would result to her commerce by the improvements made than by leaving the river in its natural state—and on that point the State must necessarily determine for itself—it may authorize them, although increased inconvenience and expense may thereby result to the business of individuals. The private inconvenience must yield to the public good. The opening of a new highway or the improvement of an old one, the building of a railroad, and many other works in which the public is interested may materially diminish business in certain quarters and increase it in others; yet for the loss resulting the sufferers have no legal ground of complaint. How the highways of a State, whether on land or by water, shall be best improved for the public good is a matter for State determination, subject always to the right of Congress to interpose in the cases mentioned.

See *Withers* v. *Buckley* (20 How., 84); *McCready* v. *Virginia* (94 U. S., 391).

II.

These cases, and many others which might be cited from the reports of the United States and the State courts, express the principles of the common law upon this matter of control over navigable waters as applied to the States. In *Gann* v. *The Free Fishers of Whitstable* (11 H. L. Cas., 192) Lord Chancellor Westbury, in delivering an opinion, said:

> The bed of all navigable rivers where the tide flows and reflows and of all estuaries or arms of the sea is by law vested in the Crown. But this ownership of the Crown is for the benefit of the subject and can not be used in any manner so as to derogate from or interfere with the right of navigation, which belongs by law to the subjects of the realm. The right to anchor is a necessary part of the right of navigation, because it is essential for the full enjoyment of that right. If the Crown therefore grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right, and he can not in respect of his ownership of the soil make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right. * * *
>
> Speaking with great respect to the learned judges in the court below, it appears to me that the error of the judgments consist in not adhering to the clear principle that the grant by the Crown of any part of the bed or soil of this estuary below low-water mark, whether for a fishery or not, must by the common law have been subject to the public right of navigation, of which the right to anchor is an essential part; that no property can be claimed in the soil except subject to this overriding right.

This principle is recognized in the ordinance of 1787 and is carried into the constitution of Michigan. In that constitution are these provisions:

> Art. XVII, sec. 4. No navigable stream in this State shall be either bridged or dammed without authority from the board of supervisors of the proper county under the provisions of law. No such law shall prejudice the rights of individuals to the free navigation of such streams or preclude the State from the further improvement of the navigation of such stream.
>
> Art. XIV, sec. 9. The State shall not be a party to, or interested in, any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the State of land or other property.

And Judge Cooley, in *Benjamin* v. *Manistee Imp. Co.* (42 Mich., 633), uses this language:

> It can not be seriously contended that the ordinance of 1787 was that the navigable rivers of the Northwest Territory should remain forever unimproved in order that they might be freely navigated in their natural condition and not otherwise. As the compact was made for the perpetual advantage of the people we must suppose that there was no purpose to limit this advantage to a minimum or to preclude either the territorial legislature or the new States which should come into the Union from increasing the benefits of the compact by improving the highways the ordinance secured, so as to make them accomplish their purposes as avenues of trade and commerce for all time. In other words, the navigable waters of the territory were placed upon the same footing with the navigable waters of the United States, the use of which is forever free, but

> nevertheless which are subject to State control and regulation, and may be improved by the States, and bridged or dammed under their legislation whenever the convenience of trade, traffic, and travel in all its infinite forms shall seem to require it. (Citing the Federal decisions.)
>
> The States may, therefore, improve the natural highways by water, and they may improve the intersecting highways even though the result may be that the use of the highways by water is thereby to some extent impeded. Free navigation, therefore, does not necessarily mean navigation of the streams in their natural condition unobstructed and unimproved.

At the time of the admission of Michigan as a State the United States was the owner of all the land in the locality in question. It had made no grant of the upland, and it had not attempted to grant any of the submerged soil. The State of Michigan was therefore the owner of all the soil of this navigable stream. Whatever riparian rights there were in any view belonged to the United States. (*Shively* v. *Bowlby*, 152 U. S., 1.; *Potomac St. Co.* v. *Upper Potomac St. Co.*, 109 U. S., 672.)

By the act of Congress of 1852 (*supra*) the United States granted to the State of Michigan the land through which this canal was built, and a large appropriation to defray the cost. Michigan built the canal, with piers extending into the water of the river opposite the land in dispute. This canal with its approaches was completed in 1855.

The confirmation of the claim of those from whom plaintiff derived title was made September 4, 1855. This was after the whole character of the work had been

determined by the United States and the State of Michigan. The expressed object was to improve the navigation of the St. Marys River, a navigable stream. There is no doubt that the State had this power.

Leaving out of discussion, for the present, the paramount power of the Federal Government to improve the navigation of this stream, there remains, that it temporarily relinquished to the State government its powers and rights in this regard, potential and incidental. By repeated acts (*ut supra*) Congress appropriated large sums of money for the "improvement" of this canal and these waters. It is true that the piers remained the same until after the passage of the act of August 14, 1876. That act appropriated $130,000 for "the repair, preservation, construction, and completion" of this canal, "to be expended under the direction of the Secretary of War." The extension of the pier was commenced in 1877. Immense sums of money were appropriated from time to time by Congress. The work, under the direction of the Secretary of War and the Corps of United States Engineers, proceeded until its completion in 1881. At or about this time of completion Michigan transferred the canal to the United States. Previously it had been under the control and ownership of the State. The United States engineers were merely constructors.

The patent to Peck and the heirs of Newcomb, under which plaintiff holds, recites the plat of survey made by Whelpley in 1854–55, which shows that the land extended "along the right bank of the Ste. Marie River." It was for so many acres. In all grants made by the

United States the quantity of the grant is fixed and designated. The lands of the United States were surveyed by fixed boundaries and artificial lines of measurement, and were sold by the acre. This practice has always been recognized in the States which were formed out of the ceded territory of the Northwest. The firm upland alone was surveyed and measured and conveyed to Fletcher and the heirs of Peck.

Whatever of his rights, then, have been invaded, plaintiff must claim, by virtue of his riparian ownership, under the law of Michigan. All riparian rights stand upon an equality when their exercise comes in conflict with the sovereign rights of the people of the State. They spring from the same source. They have their differences of characteristics and of enjoyment, but their extent and limitations are alike. They all have their definitions and their determination by law. They are subordinate to the rights of the public in the navigation and other use of the stream. They are capable of grant and surrender.

The grant of this private land claim No. 3 must be be construed with reference to the existing circumstances at the time of the confirmation of the title in 1855. The legislation by Congress and the State legislature fixes its extent. The United States and the State had laid hold upon this river for the purpose of improving the navigation. The power of both, in this regard, had been exerted when all of sovereignty and all of property were in one or the other. There was no conflict between them; they acted in unison. The authority of the State

to improve the waters in aid of domestic commerce and the authority of the Federal Government to improve the waters for commerce between the States and with foreign nations had been put in action. The object and design and nature of these improvements had been determined and great works completed before the interests of any individuals in this locality had been acquired.

The plaintiff does not claim any injury on account of the construction of the canal and pier across a part of the riparian front of private land claim No. 3 prior to that time. Upon what different reason can he base a claim for compensation for interference with his rights by the alteration and extension of the pier after the act of 1876? Congress continued after 1855 to appropriate money for the canal and the improvement of the river before the passage of that act. The work done in 1877–1881 was, by the very terms of the appropriation acts, for the repair, preservation, construction, and completion of this canal and the improvement of the river. It was a continuation of the original undertaking; a perfection of the great enterprise. The General Government defrayed the cost; its money flowed out in regular streams from year to year, after 1876, as it had done before. The State was in control of the canal until time of completion. It is immaterial, as far as the rights of this plaintiff are concerned, to inquire who erected this pier. The State of Michigan, by its legislature, had determined that to make this improvement was a proper exercise of its power. Congress had determined it was a proper exercise of its power. Manifestly, all riparian rights incident to the lands affected, which it is claimed have

been interfered with by these structures, had been either extinguished or surrendered prior to the confirmation of the title of plaintiff's predecessors.

III.

But, independent of these conclusions, we turn to the examination of the question as presented by the plaintiff here: "Whether Congress, under the exercise of its power to regulate commerce, can entirely cut off the access of a riparian proprietor from his land to the water and from the water to his land."

This involves the inquiry as to the extent of the power granted to Congress by the Constitution to regulate commerce. This power includes "all the powers which existed in the States before the adoption of the Constitution." Much that we have heretofore said, on the authority of the cases cited, is applicable in this connection. After the adoption of the Constitution the power existing in the States for the improvement of rivers within their borders was recognized as a concurrent power used in the absence of legislation by Congress. When exercised by Congress the power is paramount and illimitable. Said Chief Justice Marshall, in *Gibbons* v. *Ogden* (9 Wheat.):

> All America understands, and has uniformly understood, the word commerce to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their Government and must have been contemplated in forming it.

South Carolina v. *Georgia* (93 U. S., 4) was an original bill in equity brought by South Carolina for an injunction against the obstruction of the navigation of the Savannah River. Immediately above the city of Savannah the river is divided by Hutchinsons Island, and there is a natural channel on each side of the island, both uniting at the head. The obstruction is at the point of divergence of the two channels, and its purpose and probable effect are to improve the southern channel at the expense of the northern by increasing the flow of the water through the former, thus increasing its depth and waterway. Mr. Justice Strong, delivering the opinion of the court, said:

> That the power to regulate interstate commerce and commerce with foreign nations, conferred upon Congress by the Constitution, extends to the control of navigable rivers between States, rivers that are accessible from other States, at least to the extent of improving their navigability, has not been questioned during the argument, nor could it be with any show of reason. From an early period in the history of the Government it has been so understood and determined. Prior to the adoption of the Federal Constitution the States of South Carolina and Georgia together had complete dominion over the navigation of the Savannah River. By mutual agreement they might have regulated it as they pleased. It was in their power to prescribe not merely on what conditions commerce might be conducted upon the stream, but also how the river might be navigated, and whether it might be navigated at all. They could have determined that all vessels passing up and down the stream should pursue a defined course, and that they should pass

along one channel rather than another, where there were two. They had plenary authority to make improvements in the bed of the river, to divert the water from one channel to another, and to plant obstructions thereon at their will.

* * * * *

The action of the defendants is not, therefore, the destruction of the navigation of the river. True, it is obstructing the waterway of one of its channels and compelling navigation to use the other channel; but it is a means employed to render navigation of the river more convenient—a mode of improvement not uncommon. The two channels are not two rivers, and closing one for the improvement of the other is in no just or legal sense destroying or impeding the navigation. If it were, every structure erected in the bed of the river, whether in the channel or not, would be an obstruction. It might be a light-house erected on a submerged sand bank, or a jetty pushed out into the stream to narrow the waterway and increase the depth of water and the direction and force of the current, or the pier of a bridge standing where vessels now pass and where they can pass only at very high water. The impediments to navigation caused by such structures are, it is true, in one sense obstructions to navigation, but so far as they tend to facilitate commerce it is not claimed they are unlawful. In what respect, except in degree, do they differ from the acts and constructions of which the plaintiff complains? All of them are obstructions to the natural flow of the river, yet all except the pier are improvements to its navigability, and consequently they add new facilities to the conduct of commerce. It is not, however, to be conceded that Congress has no power to order obstructions to be

> placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage.

In *County of Mobile* v. *Kimball* (*supra*), in the course of his opinion, Mr. Justice Field said:

> That power (the commercial power of Congress) is indeed without limitation. It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries and between the citizens of the several States and to adopt measures to promote its growth and insure its safety. And as commerce embraces navigation, the improvement of harbors and bays along our coasts and of navigable rivers within the States connecting them falls within the power. The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character and admit and require uniformity of regulation, affecting alike all the States; others are local or are mere aids to commerce and can only be properly regulated by provisions adapted to their special circumstances and localities.

Wisconsin v. *Duluth* (96 U. S., 379) was also an original bill in equity in this court. The bill was brought to enjoin Duluth from continuing and carrying on a system of harbor improvements for which large and continuous

appropriations had been made by Congress. The bill was dismissed. The court, Mr. Justice Miller delivering the opinion, said:

> It is to be observed as preliminary to an examination of the acts of the General Government in the special matter before us that the whole system of river and lake and harbor improvements, whether on the seacoast or on the lakes or the great navigable rivers of the interior, has for years been mainly under the control of that Government, and that whenever it has taken charge of the matter its right to an exclusive control has not been denied. The operations of the Government in this regard have been conducted by the Bureau of Engineering, as part of the War Department, to which Congress has confided the execution of its wishes in all these matters. That Department has mapped out in suitable geographical divisions the works thus imposed upon it and placed these under the control of officers who are in charge of them. These are again subdivided, so that while the lake system, or, at all events, the Western lake system, is in charge of one general superintendent, the separate works which at different places are conducted under him have each another engineering officer, who has special charge of those works.
>
> For many years past Congress has been in the habit of passing an annual appropriation bill, called the river and harbor bill, devoted to works of this class exclusively, and in these bills it appropriates specific sums to specific works, either already commenced and unfinished or for new works thereby authorized, or sums necessary for the safety and protection of works already in existence. The money thus appropriated is expended, as we have said,

under the direction of the War Department. It can not be necessary to say that when a public work of this character has been inaugurated or adopted by Congress and its management placed under the control of its officers there exists no right in any other branch of the Government to forbid the work or to prescribe the manner in which it shall be conducted.

* * * * *

We do not feel called upon to make an argument to prove that these statutes of the Congress of the United States and these acts of the Executive Department in carrying those statutes into effect constitute an adoption of the canal and harbor improvement started by the city of Duluth and a taking exclusive charge and control of it, that they amount to the declaration of the Federal Government that we here interpose and assert our power; we take upon ourselves the burden of this improvement, which properly belongs to us, and that hereafter this work for the public good is in our hands and subject to our control.

Nor can there be any doubt that such action is within the constitutional power of Congress. It is a power which has been exercised ever since the Government was organized under the Constitution. The only question ever raised has been, How far and under what circumstances the exercise of the power is exclusive of its exercise by the States? And while this court has maintained, in many cases, the right of the States to authorize structures in and over the navigable waters of the States, which may either impede or improve their navigation in the absence of any action of the General Government in the same matter, the doctrine has been laid down with unvarying uniformity that when Congress has, by any expression of its will, occupied the field, that action

> was conclusive of any right to the contrary asserted under State authority. The adjudged cases in this court on this point are numerous.

In *Miller* v. *The Mayor, etc., of New York* (109 U. S., 385), affirming and approving the same case in the circuit court (13 Blatch., 469), the court, by Mr. Justice Field, said:

> The erection of the bridge at the elevation proposed was authorized by the action of both the State and Federal governments. It would, therefore, when completed, be a lawful structure. If, as now completed, it obstructs in any respect the navigation of the river, it does so merely to an extent permitted by the only authorities which could act upon the subject; and the injury then apprehended and alleged by the plaintiff and now sustained is only such as is common to all persons engaged in commerce on the river and doing business on its banks, and, therefore, not the subject of judicial cognizance.

Chappell v. *Waterworth* (the Hawkins Point Light-House Case, 39 Fed. Rep., 77) was an action of ejectment brought in the circuit court of the United States for the district of Maryland to dispossess the United States of a light-house built by authority of Congress on submerged land on the bottom of Patapsco River, a navigable river of the United States. The plaintiff had acquired by grant from the State title to the upland and shore and the bed of the stream covered by the light-house, and had riparian rights conferred by the statutes of Maryland. The circuit judge, in delivering the opinion, said:

> While the submerged land remains a part of the bed of the river, it is not private property in the

sense of the fifth amendment to the Federal Constitution. As was declared in *Gilman* v. *Philadelphia* (3 Wall., 725): "The navigable waters are the public property of the nation, subject to all requisite legislation by Congress." In the hands of the State or the State's grantee the bed of a navigable river remains subject to an easement of navigation which the General Government can lawfully enforce, improve, and protect.

It is by no means true that any dealing with a navigable stream which impairs the value of the rights of riparian owners gives them a claim for compensation. The contrary doctrine, that in order to develop the greatest public utility of a waterway private convenience must often suffer without compensation, has been sanctioned by repeated decisions of the Supreme Court.

We have seen that in constructing this magnificent and expensive work the United States and the State of Michigan joined. This is not important as far as the power of Congress is concerned. Even if there had been conflict between the two jurisdictions, when the Federal Government, by its agents, took control of the canal with its structures and connections, or any of them, this was a declaration and an exercise of the plenary power by Congress. For Congress has the unconditional authority to determine when and where to exert this power, and if these submerged lands had belonged to the State, as they did when this work was commenced, the Federal Government could have taken them without consent and without compensation for these purposes. This condition did not arise here, for the canal and pier of 1852–1855 were built by the State with the proceeds

of the Congressional grant of 1852; and whatever occupation and regulation were had by the officers of the General Government, by reason of the appropriations made in 1870, 1871, 1874, and 1875 (*ut supra*), were had with the consent of the State. Manifestly this was in recognition of the supreme jurisdiction of Congress. While, therefore, there is no question between the two governments, these facts and these principles are material in determining what rights, if any, of the plaintiff have been interfered with.

These principles were discussed and ably stated by Mr. Justice Bradley, in *Stockton, Atty. Gen.*, v. *Baltimore and N. Y. R. Co.* (32 Fed. Rep., 9). That was an information filed by the attorney-general of New Jersey to enjoin the railroad company from erecting a bridge across "Arthur Kill," between New Jersey and Staten Island, upon lands of the State situated on the shore and under the waters of the "Kill." The railroad company claimed the right to build the bridge and to occupy the lands under water necessary for the support of its piers by virtue of an act of Congress approved June 16, 1886. The constitutionality of the act and the right of the railroad company to build the bridge were denied upon many grounds, all of which were overruled by Mr. Justice Bradley. In considering this supreme power to regulate commerce, that judge said:

> The information rightly states that prior to the Revolution the shore and land under water of the navigable streams and waters of the province of New Jersey belonged to the King of Great Britain as part of the *jura regalia* of the Crown, and devolved to the State by right of conquest. The information

does not state, however, what is equally true, that after the conquest the said lands were held by the State, as they were by the King, *in trust* for the public uses of navigation and fishery and the erection thereon of wharves, piers, light-houses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris;* in other words, they were held for the use of the people at large.

* * * * *

Such being the character of the State's ownership of the land under water—an ownership held, not for the purpose of emolument, but for public use, especially the public use of navigation and commerce—the question arises whether it is a kind of property susceptible of pecuniary compensation, within the meaning of the Constitution. The fifth amendment provides only that *private property* shall not be taken without compensation, making no reference to public property. But if the phrase may have an application broad enough to include all property and ownership, the question would still arise whether the appropriation of a few square feet of the river bottom to the foundation of a bridge, which is to be used for the transportation of an extensive commerce in aid and relief of that afforded by the waterway, is at all a diversion of the property from its original use. It is not so considered when sea walls, piers, wing dams, and other structures are erected for the purpose of aiding commerce by improving and preserving the navigation. Why should it be deemed such when (without injury to the navigation) erections are made for the purpose of aiding and enlarging commerce beyond the capacity of the navigable stream itself and of all the navigable waters of the country? It is commerce and

not navigation which is the great object of constitutional care.

The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams, and these are so completely subject to the control of Congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States has or has not the theoretical ownership and dominion in the waters or the land under them; it has what is more, the regulation and control of them for the purposes of commerce. So wide and extensive is the operation of this power that no State can place any obstruction in or upon any navigable waters against the will of Congress, and Congress may summarily remove such obstructions at its pleasure. And all this power is derived from the power "to regulate commerce." Is this power stayed when it comes to the question of erecting a bridge for the purposes of commerce across a navigable stream? We think not. We think that the power to regulate commerce between the States extends not only to the control of the navigable waters of the country and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges, and all other instrumentalities of commerce which, in the judgment of Congress, may be necessary or expedient.

This case goes much farther than is necessary to support the contention of the Government in the present case, for it holds that the bed of a river, owned by the State, may be used by the United States without the consent of the State and without compensation, for the construction of a bridge over the river, and not in aid of

the navigation of the river, but in aid of interstate commerce generally. A further extension of this doctrine is found in cases like *Pennsylvania* v. *Wheeling Bridge* (18 How., 429), and "*The Clinton Bridge*" (10 Wall., 454), where the court had decided in the former case that Congress could interfere and legalize a bridge, a decree having been rendered declaring it an obstruction and directing it to be removed, by elevating the bridge, or if not, by abatement; and in the latter case, that Congress could legalize a bridge, pending a suit to remove the structure as a nuisance.

IV.

The contention of the plaintiff is narrowed to one point, and to prevent inexactness is stated in his own language:

> *It is not claimed here that compensation must be made for the appropriation of submerged lands, but that Congress has no power to cut off the plaintiff from his access to and from the navigable water in front of his land without compensation. We contend that the right of access of a riparian owner is a property right which can not be destroyed nor appropriated by Congress under the commerce clause of the Federal Constitution, except in accordance with the provisions of the fifth amendment.*

While we do not admit the fact assumed in this statement, we will proceed to the examination of the proposition, and especially in connection with the principles above asserted. For it is difficult to see how, where in a navigable nontidal river the ownership of the soil to the center of the stream is in the riparian owner, and an

obstruction is erected upon the submerged land of such owner, the right of access can be completely dissociated from that ownership.

It was long questioned in England whether an owner of land on the banks of a public navigable river has the same natural rights as one who has land abutting on a private stream and whether the fact of a river being tidal makes any difference. In *Lyon* v. *Fishmonger's Co.* (1 L. R., 1 App. Cas., 662) this question was settled and the distinction made that the rights existed in each case, but in the case of a public navigable river the rights of the riparian owner must be subject to the public right of navigation.

These *natural* rights are, generally, connected with the condition of the water in front of the bank of the riparian owner. They are: Right to the flow of the water without diminution, deterioration, or alienation of current; right to purity of the water, not contaminated by use of other riparian owners above; right to take water for use and consumption as it passes in the stream.

Now, the right of access is called a *natural* right in precisely the same way as these natural rights are spoken of. Indeed, there is a manifest connection and dependence on the part of the former. As Lord Selborne, in this leading case of *Lyon* v. *Fishmonger's Co.* (*supra*) said:

> The rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturæ*, because his land has by nature the advantage of being washed by the stream; and if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognize and follow

> the course of nature in every part of the same stream. With respect to the ownership of the bed of the river, this can not be the foundation of riparian rights properly so called, because the word riparian is relative to the bank and not to the bed of the stream, and the connection, when it exists, of property on the banks with property in the bed of the stream depends not upon nature, but upon grant or presumption of law. The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may lawfully be so appropriated by every one having a right of access to it.

These natural rights exist in relation to both nonnavigable and navigable streams. In the latter they have a limitation. The needs of society require limitations of all natural rights. The distinction is transparently made by the Lord Chancellor in his opinion in the above case:

> A riparian owner on a navigable river has, of course, superadded to his riparian rights the right of navigation over every part of the river; and, on the other hand, his riparian rights must be controlled in this respect, that whereas, in a nonnavigable river all the riparian owners might combine to divert, pollute, or diminish the stream, in a navigable river the public right of navigation would intervene and would prevent this being done.

In other words, these riparian rights in a navigable stream exist, but are subordinate to the public right of navigation. As Lord Selborne expressed it, the riparian proprietor has "a right to the river frontage belonging by nature to his land, although the only practical ad-

vantage of it might consist in the access thereby afforded him to the water, for the purpose of using, when upon the water, the right of navigation common to him with the rest of the public. Such a right of access is his only, and is his by virtue, and in respect of his riparian property; it is his wholly distinct from the public right of navigation."

What is this right of access as independent of the ownership of the submerged land? It is difficult to frame a definition which will embrace all cases. For this right, when asserted on the banks of a stream which has not tides nor shore, is dependent more or less upon surrounding circumstances. But it may safely be said that it is a right to reach from the bank of the owner's land that portion of the river which is or may be used for navigable purposes. It does not necessarily extend to all the water of all the river, nor to the deepest water in front of the land. It is an exclusive right; but the measure of its exclusiveness is to reach the navigable river from that frontage. The approach may be made by a step, by stairs, or wharves, or piers, or in any manner which will not interfere with the rights of other proprietors or the public right of navigation.

The right is not qualified by the riparian lines which govern the extent of ownership of the soil to the thread of the stream. It stands upon distinct reasons from that of such ownership or any of its boundaries.

If a riparian owner can without hindrance reach navigable water over which he can go to the deepest part of the river equally with other riparian owners in the same

plight, and with the public, he can have no redress against an obstruction which is between the deepest water and the water thus used. This is but an inconvenience common to him and others. He can go to and from the highway unimpeded. His right of access is not interfered with.

Rose v. *Groves* (5 M. & G., 613), quoted by the plaintiff here, illustrates what the manner of obstruction must be to entitle to compensation. There the defendant placed logs in the river, which floated down and lodged against the plaintiff's bank and prevented access to his inn. Plaintiff recovered damages for this obstruction. His guests could not come from the highway to his inn.

And so with all highways, whether on land or water. The obstruction must be to the "immediate access from private property to the public highway," to use the language of Lord Selborne.

In *Montreal* v. *Drummond* (1 App. Cas., 384) it was held that the closing of one end of a street was not an interference of the right of access as gave a claim for compensation. Sir Montague E. Smith, in delivering the opinion, said:

> The right of access to a house is of course essential to its enjoyment, and if, by reason of alterations in the street, the owner can not get into or out of it, or is obstructed in doing so, there seems to be no doubt that by the laws of France he is entitled to recover in some form indemnity for the damage he sustains. But the stopping of a street at one of its ends does not produce these consequences. * * * The only effect of making the street a *cul de sac*, so far as the rights of access and passage are con-

cerned (apart from the loss of customers to be presently mentioned), is that the plaintiff's tenants have to go by other streets and farther to reach the southern part of the city.

In *Blackwell* v. *Old Colony Railroad Co.* (122 Mass., 1), which was an action for direct injury to the navigation of the stream, the court, by Gray, C. J., said:

> The fact that the plaintiff alone now navigates the stream, or has a wharf thereon at which he carries on business, only shows that the present consequential damage may be greater in degree than to others, but does not show that the injury is different in kind or that other riparian proprietors and the rest of the public may not, whenever they use the stream, suffer in the same way. The case has no analogy to those in which an obstruction in a navigable stream sets back the water upon the plaintiff's land, or, being against the front of his land, entirely cuts off his access to the stream, and thereby causes a direct and peculiar injury to his estate.

V.

The plaintiff does not claim that he has been interfered with in the actual exercise of any right. His bank line is open and unobstructed. The water flows in pure and natural current by his land. No embankment or pier or vagrant log rests against his premises. He has built no platform and stairs for the reception of guests. He has projected into the water no wharf or pier to which vessels may come and unload their cargoes. He has no warehouses nor stores nor shops nor business which have been or are subjected to or threatened with loss and destruction. He asserts a naked right of access and that he has been

deprived of it. If this were an action of damages, what would be the measure of his damages? What could he recover?

In *Coburn* v. *Ames* (52 Cal., 385), some such condition was referred to, and the court, by Judge Champlin, who delivered the opinion, said (p. 398):

> Assuming, as we do, for the purposes of this decision, that the riparian proprietor is entitled to wharf out to deep water, it is clear, we think, that this right is in the nature of a franchise or privilege, to be exercised by him at his election. He may never see fit to avail himself of the privilege, and it can not be pretended that while declining to avail himself of his right to wharf out, he is, nevertheless, entitled to the possession of the land below high-water mark, on the theory that at some future time he may possibly change his mind and desire to erect a wharf. On this theory he might capriciously refuse to erect a wharf at a point where the convenience of commerce demands it, and might prevent others indefinitely from engaging in the enterprise. A theory which works this result ought not and can not be upheld. On the contrary, giving to this right of the riparian owner its widest scope and latitude, it amounts only to this, that if he desires to wharf out and is unlawfully obstructed in the right he may maintain an action for damages; and if the obstruction amounts to a public nuisance he may possibly cause it to be abated by the appropriate method.

But, as a fact, this plaintiff has been deprived of no property right of access whatever. He can go to and from the water exactly as he could before the erection of this pier. He can use the right of navigation, when upon

the water, common to him with the rest of the public. He can go to the deepest water with entire freedom, although the way is a little longer. Any vessel or craft, of whatever size or description, which could come to his land before can come now. He has full right to build wharves and piers for his profit and advantage in front of his land, provided they do not interfere with the public right of navigation; and this is all he ever could do. It is to be remarked, too, that these lands are above the rapids of the St. Marys River; and that, before the digging of this canal and the building of the original piers, there were scant trade and traffic on those waters and none which could not be carried on in vessels small enough to navigate the present unobstructed water between the piers and the front of plaintiff's land. If he suffered any damage it was remote, consequential, inappreciable, and of the same kind as the rest of the public would suffer if they used the water. The canal and piers created the navigation and the commerce as they now are. What were then idle waters of lake and river now carry in a single year 21,000,000 tons of freight in 17,000 bottoms. What more imposing illustration of the power to regulate commerce could be given. What more convincing proof that these works were in aid of navigation.

In all the cases in Michigan the doctrine is stated that the ownership of the soil to the middle of the stream is subject to the right of navigation. In *Ryan* v. *Brown* (*supra*), where the extreme position is taken, the court say that the control of the use of such land by the riparian owner is limited and qualified by such rights as belong to the public at large to the navigation, and such

other use, if any, as appertains to the public over the water, and the State authorities are cited. In *Benjamin* v. *Manistee Improvement Co.* (42 Mich., 633), Judge Cooley, speaking for the court, says that the States may improve the natural highways by water, though the result may be that their use is thereby somewhat impeded. It is a rule of this property, universal and undisputed.

If the State, being owner of the submerged land in navigable streams, makes a grant of the same to an individual, he takes subject to this right of navigation, which includes the right of improvement. If the State has relinquished her right of ownership to all riparian owners, they hold subject to this same trust and servitude. The owner by operation of law has no stronger title than the owner by direct grant.

The constitutional power granted to Congress to regulate commerce authorizes the taking of the beds of streams and the waters over them to improve navigation. The necessity for and manner of exercising this power are within the sole province of Congress. This power can not and will not be exercised in conflict with any other provision of the Constitution. It is undisputed that private property can not be taken for public uses without just compensation. This is true as well of the State of Michigan as of the United States. And yet, when the soil and waters of a navigable stream, in their natural state, unincumbered and unused by the riparian proprietor, are taken possession of by Congress for the purposes of aids to navigation, and structures erected which do not touch the banks of the land of such proprietor nor prevent his free approach to the water, although he may

own *ad filum aquæ* and the erections are within that line, he has no ground for compensation, because no private property of his has been taken. If he had exercised the right to make improvements, and they had been taken, there would arise a different question.

This is a distinction which the plaintiff completely ignores; but it is the distinction of the cases—as well those cited by plaintiff's counsel as others. *Yates* v. *Milwaukee*, where a wharf had been built upon land covered by water of no use for navigation, to navigable water, decided that "the mere declaration of a city council that the wharf built and owned by plaintiff was a nuisance did not make it such, or subject it to be removed by authority of the city. It was recognized in the opinion that by the law of Wisconsin, established by the decisions of its supreme court, the title of the owner of land bounded by a navigable river extended to the center of the stream, subject, of course, to the public right of navigation." (*Shively* v. *Bowlby*, 152 U. S., 1, 40.)

Monongahela Navigation Co. v. *United States* only decided that where vested property, corporeal and a franchise to take tolls for the use of that property, are taken or destroyed by the Federal Government, the owner is entitled to just compensation.

These were equally property rights. If the locks and dams had not been built prior to the occupation under authority of Congress, there would have been no right for compensation for the franchise.

Dutton v. *Strong* decided that a riparian owner might, subject to all the limitations of submission to State regulations and to paramount power, build a wharf out to the

point of navigability. The whole doctrine of the property rights of riparian owners is elaborately and exhaustively treated of in the case of *Shively* v. *Bowlby* (*supra*).

Delaplaine v. *Chicago & N. W. Ry. Co.* and *Brisbane* v. *St. Paul, etc., Ry. Co.*, cited by plaintiff, decided that the owner's immediate contact with the water could not be interfered with by the corporations; and these were cases where the rights of owners were in conflict with the acts of private persons or corporations. Such, also, are the Wisconsin, Canada, and New York cases cited in plaintiff's brief. In *Ramsey* v. *N. Y. & N. E. R.* (133 N. Y.) the court, in deciding that the owner of land on a public river can recover damages from a railroad company for building an embankment across his water front and depriving him of access to the navigable part of the stream, declared that the principle could not "of course be extended so as to interfere with the right of the State to improve the navigation of the river or with the power of Congress to regulate commerce under the provisions of the Federal Constitution." The New York cases are reviewed in the late case of *Sage* v. *The Mayor, etc.* (154 N. Y., 61), and the principle laid down that the right of access may be entirely destroyed without compensation to the owner when this is done for the improvement of navigation and commerce. And in New Jersey it has been decided that the State can cut off the access of an abutting owner at will. (*Stevens* v. *Paterson, etc., R. R. Co.*, 5 Vroom, 532; *Mayer, etc., Hoboken* v. *Pa. R. R. Co.*, 124 U. S., 656.)

It is admitted, however, that plaintiff can not recover for the occupation of the submerged land. He has the

right of ownership and the right of access by virtue of his ownership of the abutting land. His right of access is completely enjoyed within the lines of his ownership to the center of the stream. How, then, can it be a higher or more sacred right? The proposition that it is a part of the upland avails nothing. A part can not be greater than the whole. And the submerged soil is equal in its estate to the upland, with these limitations, which are common to these *appurtenant* rights—the subordination to the public right of navigation and the paramount power in Congress.

There can be no question in cases like the one at bar as to the extent of the necessity for the impairment or destruction of riparian rights in the exercise of the power to regulate commerce. That is not a matter of judicial cognizance. The determination rests entirely with Congress. So, when it is intimated that the pier erected by the Federal Government might be used within certain arbitrarily marked lines as a portage, under private right, to carry goods and merchandise, or as a private wharf for loading and unloading cargoes, the power to regulate is taken from Congress and transferred to the individual. To state this proposition is enough. The manner of using the pier is a regulation of commerce.

These views are sustained by the latest deliverances of the Federal courts. *Gibson* v. *United States* (166 U. S., 269) was a case where the claimant had a farm in a high state of cultivation, with a dock or landing place used by her in shipping products to market. Under proper authority the Government built a dike for the improve-

ment of the navigation of the Ohio River, which substantially destroyed the claimant's access to the river and greatly injured her business. There was no physical contact with claimant's land. The court held there could be no recovery for taking of private property. Mr. Chief Justice Fuller, after tersely stating the principles governing encroachments upon riparian rights, in delivering the opinion of the court, said:

> Riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard. The legislative authority for these works consisted simply in an appropriation for their construction, but this was an assertion of a right belonging to the Government to which riparian property was subject, and not of a right to appropriate private property not burdened with such servitude to public purposes.
>
> In short, the damage resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property has always been subject.

And this is the law of property, determined, in harmony with all previous decisions, by the supreme court of Michigan, in this case limiting the rights of riparian owners. Without going into the history of the proceedings, this case had been taken by regular steps to the circuit court of appeals. The decision and reasoning of that court, in affirming judgment for the defendant, were adopted by the supreme court of Michigan. The learned

judge who delivered the opinion, in the circuit court of appeals, said in part:

> It must, from these constitutional principles, follow that the State of Michigan held the soil beneath her navigable rivers under a high public trust, to forever preserve them free as public highways, subject only to the power of Congress to regulate commerce among the States. The legal title which, under the law, becomes vested in such proprietors must be subject to the same public trusts, and therefore subordinate to the rights of navigation and subordinate to the power of Congress to control and use the soil under such streams whenever the necessities of the navigation and commerce should demand it. The right of Congress to regulate commerce, and, as an incident, navigation, remains unaffected by the question as to whether the title to the soil submerged is in the State or is in the owner of the shore. A distinction must be recognized between that which is *jus privatum* and that which is *jus publicum*. This private right is subordinate to the public right. The plaintiff holds the naked legal title, and with it he takes such proprietary rights as are consistent with the public rights of navigation and the control of Congress over that right. This much seems expressly ruled in *Illinois Central Railroad Company* v. *Illinois*. Such submerged lands can only be disposed of by the State when that can be done without injury to the interest of the public in the waters, and subject to the paramount right of Congress to control their navigation so far as necessary for the regulation of commerce with foreign nations and between the States. (146 U. S., 387; 13 Sup. Ct. Rep., 110.) The right of access to deep water, which was considered in *Attee* v. *Packet*

Co. (21 Wall., 389), and *Yates* v. *Milwaukee* (10 Wall., 497), and *Gilman* v. *Philadelphia* (3 Wall., 724), is likewise a right subordinate to the power of the State and the Federal Government to control the stream in so far as necessary for the purpose of commerce. * * *

What is a proper exercise of this power of Congress to aid navigation seems to be for Congress to determine. The case of *South Carolina* v. *Georgia* (93 U. S., 4) is an illustration of the great discretion reposed in Congress as to the selection of means proper to the improvement or promotion of such public highway. In that case it was decided that Congress has the power to close one of several channels in a navigable stream, if, in its judgment, the navigation of the river will thereby be improved. The case did not turn upon the fact that the bill in the case was filed by the State of South Carolina, but was upon a construction of the power of Congress to determine the means by which the navigation of a river may be improved. See also the case of *Pennsylvania* v. *Wheeling Bridge Company* (18 How., 421) and *Wisconsin* v. *Duluth* (96 U. S., 379).

If the title had remained in the State, the conclusion would be the same. The State would hold subject to the public use, and its property right in the submerged soil of a navigable stream would be subservient to the power of Congress to regulate navigation, and the use of such soil as a support for a structure in aid of navigation would not have been the taking of the private property of the State, within the meaning of the constitutional provision inhibiting it without compensation. (*Scranton* v. *Wheeler*, 16 U. S. App., 152, 194.)

The following propositions are submitted by the defendant in error:

I.

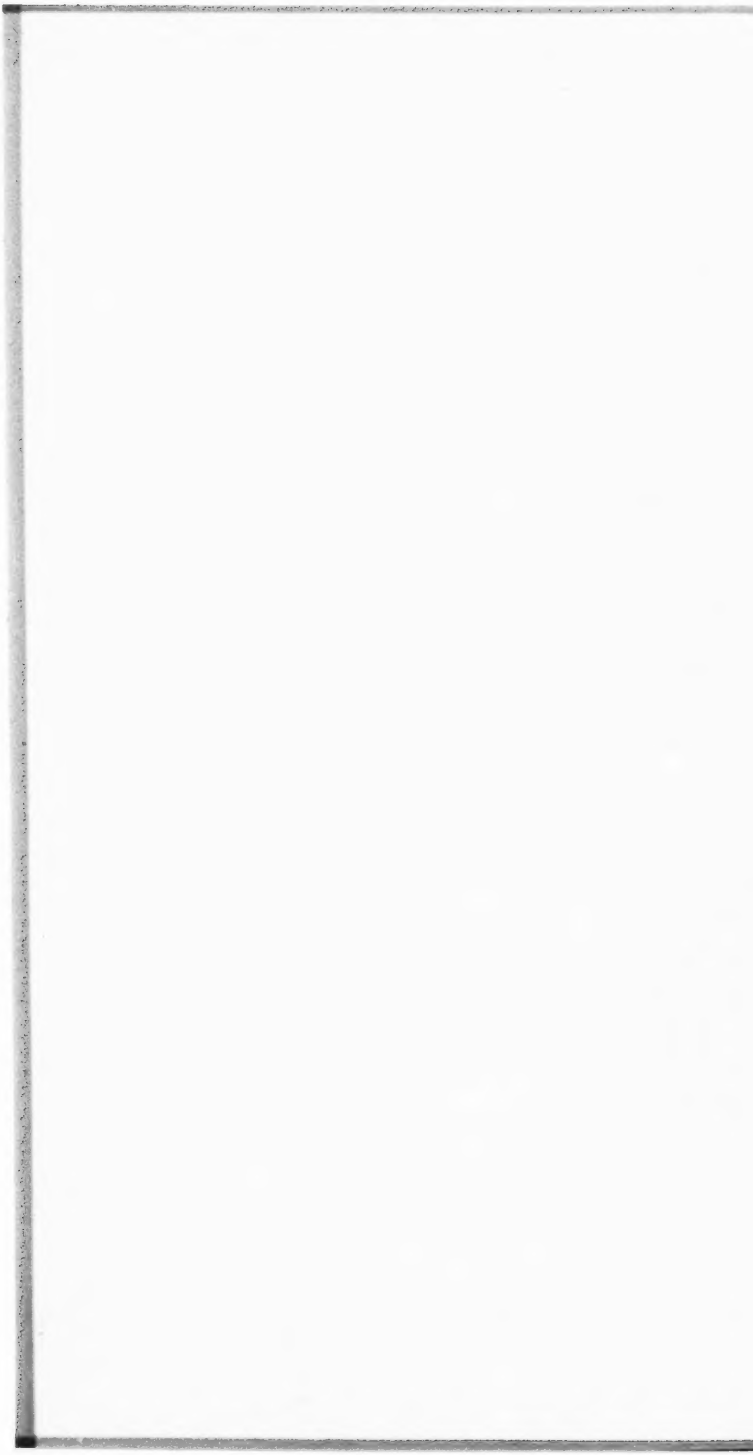
Ejectment is not the proper remedy for a riparian owner to secure removal of a structure which interferes with his access to navigable water. (*Coburn* v. *Ames*, 52 Cal., 385; *Parker* v. *West Coast Packing Co.*, 17 Oreg., 510; *Austin* v. *R. R. Co.*, 45 Vt., 244.)

II.

The building of the canal and pier at Sault Ste. Marie was within the authority of the State of Michigan in the aid of navigation and commerce; and the subsequent enlargement and continuation of the piers, effected by the State and by Congress, were within their plenary power and constituted no infringement of the rights of this riparian owner for which he is entitled to compensation.

ROBERT HOWARD,
Special Assistant Attorney.

JOHN K. RICHARDS,
Solicitor-General.



Supreme Court of the United States.

No. 9.—October Term, 1900.

Gilmore G. Scranton, Plaintiff in Error, vs. Eben S. Wheeler. } In error to the Supreme Court of the State of Michigan.

[November 12th 1900.]

This writ of error brings up for review a final judgment of the Supreme Court of Michigan holding that the United States is not required to compensate an owner of land fronting on a public navigable river when his right of access from the shore to the navigable part of such river is permanently obstructed by a pier erected in the river under the authority of Congress for the purpose only of improving navigation.

Omitting any reference to immaterial matters, the case as made by the pleadings and evidence is as follows:

By an act of Congress approved September 26th 1850, *c.* 71, providing for the examination and settlement of claims for land at the Sault Ste. Marie in Michigan, the local register and receiver of the land office were authorized to report upon claims to lots at that place under instructions to be given by the Commissioner of the General Land Office. 9 *Stat.* 469.

In conformity with proceedings under that act the heirs of Franklin Newcomb and Samuel Peck were confirmed in their claim jointly to premises known as Private Land Claim No. 3, and a patent was issued to them by the United States on the 6th day of October 1874. The premises were at the west or upper end of the St. Mary's Falls Ship Canal, and one of the boundaries, as shown by the field notes, was "along the right bank of the Ste. Marie River." By mesne conveyances from the heirs of Franklin Newcomb the plaintiff, Scranton, became the owner of an undivided half of the land in question.

By an act approved August 26th 1852, *c.* 92, Congress granted to the State of Michigan the right to locate a canal through the public lands in that State known as the military reservation at the Falls of St. Mary's River, and four hundred feet of land in width extending along the line of the canal was granted for the construction and convenience of the canal and the appurtenances thereto, the use being vested in the State for such purposes and no other. The act provided that the canal should be located on the line of the survey made for that purpose or on such other route between the waters above and below the Falls as might be selected with the approval of the Secretary of War. In aid of the construction

and completion of the canal Congress also granted to the State seven hundred and fifty thousand acres of public lands, and it was provided that the canal should be and remain a public highway for the use of the United States, free from toll or other charge upon the vessels of the Government engaged in the public service or upon vessels employed in the transportation of property or troops of the United States. 10 *Stat.* 35.

The construction of the canal was begun by Michigan in 1853 and completed in 1855. It was owned and operated by the State until the year 1881, when it was transferred to the United States in conformity with the River and Harbor Act of June 14th 1880, c. 211, by which $250,000 was appropriated for improving and operating the river and the canal, and by which also the Secretary of War was authorized to accept on behalf of the United States from the State of Michigan the St. Mary's Canal and the public works thereon—the transfer to be so made as to leave the United States free from all debts, claims or liability of any character whatsoever, and the canal after the transfer to be free for public use. By the same act the Secretary of War was authorized, such transfer being made, to draw from time to time his warrant on the Treasury to pay the actual expenses of operating and keeping the canal in repair. 21 *Stat.* 180, 189.

Prior to the transfer Congress had made large appropriations for the repair, preservation, improvement and completion of the canal. 16 *Stat.* 224, c. 240; *Id.* 402, c. 34; 18 *Stat.* 238, c. 457; *Id.* 456, c. 134; 19 *Stat.* 136, c. 267; 20 *Stat.* 156, c. 264; *Id.* 369, c. 181; 21 *Stat.* 189, c. 211.

As originally constructed, a pier extended from the west end of the canal into the water, curving to the north. This pier was opposite to a part of Private Land Claim No. 3, but left at that time a riparian frontage for those premises of from three to four hundred feet.

In 1877 the United States commenced and in 1881 completed the construction in the water of what is known as the New South Pier, which extended across the entire front of Private Land Claim No. 3 and was within the riparian ownership of the plaintiff as projected from the land towards the middle thread of the stream. The effect of the construction of this new pier was to exclude the plaintiff altogether from access from his land within the lateral lines of his riparian ownership, projected as aforesaid, to the navigable water or to the channel of the river that was navigable. On both sides of the space included within such projected lines of the plaintiff's riparian ownership and between the new pier and the bank of the river, the water was only five feet in depth; so that by reason of the construction and maintenance of the pier the plaintiff was prevented from reaching navigable water of greater depth than five feet.

The plaintiff desired to land freight on the New South Pier, and thus convey it to the lot in question. But he was prevented from doing so by the defendant Wheeler, superintendent of the property, who was in

possession of and exercised exclusive control over the canal and the pier as an officer or agent of the United States, and not otherwise.

No part of the pier in question in front of Private Land Claim No. 3 rests upon the fast land within that claim, but entirely upon submerged lands in front of or opposite to the fast land. The water between the pier and dry land is very shoal.

St. Mary's River forms a part of the boundary line between the United States and Canada, and where navigable forms, with the Great Lakes, a highway for interstate and international commerce. Near the point in question the river was not originally navigable owing to the falls, and the canal was built around the falls to connect its navigable parts above and below, and was used in connection therewith for the purposes of such commerce.

The present action was brought by Scranton against Wheeler in the Circuit Court of Chippewa County, Michigan, the declaration alleging that the plaintiff was the owner in fee but was illegally deprived by the defendant of the possession of his interest in "Private Land Claim No. 3, Whelpley's survey, in the village of Sault Ste. Marie, Michigan, including therein that portion of the land beneath the water of St. Mary's River from the river bank on said lot to the thread of the stream of said river, which forms a part of said lot, and all riparian rights belonging and attaching thereto and being a part thereof;" which premises the plaintiff claimed in fee. The damages alleged were $35,000.

Upon the petition of Wheeler, the action was removed for trial into the Circuit Court of the United States on the ground that the Government of the United States was the real party in interest, and that the defense depended upon the construction of the laws of the United States. In that court there was a judgment in his favor. The case was then carried to the Circuit Court of Appeals, where the judgment was affirmed, an elaborate opinion being delivered by Judge Lurton. 16 *U. S. App.* 152; 57 *Fed. Rep.* 803. That court held: That an officer of the United States could be sued in ejectment by one claiming the title and the right of possession; that the case was properly removed to the Circuit Court for trial; that the Circuit Court of Appeals had jurisdiction under the act of March 3d 1891, c. 517, 26 *Stat.* 826, to review the judgment of the Circuit Court; and that as "an incident to ownership of lands on the margins of navigable streams, the law of Michigan attaches the legal title to the submerged lands under the stream comprehended within parallel lines extending perpendicular to the general trend of the shore along his land to the center of the stream." After observing that although the plaintiff under the law of Michigan was seized of the legal title to the soil under the water, yet, in the very nature of the property, such seizure was of the bare technical title, the court proceeded: "It must, from these constitutional principles, follow that the State of

Michigan held the soil beneath her navigable rivers under a high public trust, to forever preserve them free as public highways, subject only to the power of Congress to regulate commerce among the States. The legal title which, under her law, becomes vested in such proprietors, must be subject to the same public trusts, and therefore subordinate to the rights of navigation, and subordinate to the power of Congress to control and use the soil under such streams whenever the necessities of navigation and commerce should demand it. The right of Congress to regulate commerce, and, as an incident, navigation, remains unaffected by the question as to whether the title to the soil submerged is in the State or is in the owner of the shores. A distinction must be recognized between that which is *jus privitum* and that which is *jus publicum*. This private right is subordinate to the public right. The plaintiff holds the naked legal title, and with it he takes such proprietary rights as are consistent with the public right of navigation, and the control of Congress over that right. . . The significance of that case [*Willson* v. *Marsh Co.*, 2 *Pet.* 245], as it affects this, was the refusal to enjoin the erection of the bridge on the complaint of one owning land on the shores above, whose access to and use of the stream was thereby injured. His property had not been taken. The injury to him was consequential, and he was held to be without remedy. Here the plaintiff has sustained an injury which is wholly the consequence of the erection of a structure by Congress in aid of the general and public right of navigation. If Congress may lawfully use the soil as a support for such structures without acquiring the naked title outstanding in the plaintiff, then, for such injuries as are merely consequential, it is a case of damage without an actionable injury. A distinction exists between those cases where, under authority of the State, a structure has been placed in a navigable stream, such as a bridge, or lock and dam, as an improvement to the navigation of a stream wholly within its borders, and which is sought to be removed under the authority of subsequent Congressional legislation. In such case, the improvement, being by authority of law, can only be taken for public uses upon just compensation. This is the doctrine of the case of *Monongahela Navigation Co.* v. *United States*, 148 *U. S.* 312. In that case it was held that not only must the actual property of the owner in the structure, but his franchise also, must be paid for. The plaintiff in the case before us has made no improvements for either public or private uses. No property of his has been invaded, none has been taken. The title in him was subject to the public uses. He held the soil under the river subservient to the purposes of navigation. The right to regulate commerce involved the right to regulate navigation, and this, in turn, involves the necessary uses of the submerged lands, in so far as such use was essential to the maintenance of the public highway. . . The conclusion that we have reached is that there is no error in the judgment

of the Circuit Court. The plaintiff has no such ownership of the *locus in quo* as makes its use for the purposes to which it has been devoted a taking of private property within the meaning of the Constitution."

Upon writ of error to this court the judgment of the Circuit Court of Appeals was reversed, upon the joint motion of the parties, with directions to remand the case to the State court for trial. The parties concurred in the opinion that the case was not removable from the State court—*Tennessee* v. *Union and Planters' Bank*, 152 *U. S.* 454, and *Chappel* v. *Waterworth*, 155 *U. S.* 102, being cited by them in support of that view.

At the trial in the State court the plaintiff asked the court to charge the jury—

That under the law of Michigan applicable to the facts in this case, the plaintiff was the owner of the submerged land in front of his upland, bounded by lines extending from the lateral lines of the upland to the center file of the stream, and running at right angles with the course of the stream in front of the upland, and therefore that the land and property described in the declaration belonged to and was owned by the plaintiff in fee simple, and so belonged to him when the action was brought;

That the pier or structure in question was constructed and was maintained by the defendant across plaintiff's land without his consent and against his rights in the premises;

That neither the defendant nor the United States had any lawful right to construct the pier on and across the premises in question, thus taking possession of the premises adversely to the plaintiff and excluding him from enjoyment thereof, and from all access from his land and premises to the navigable water of the river in front thereof, and from the navigable water of the river to his land;

That neither the Government of the United States nor the defendant had any lawful right to so construct the pier or to maintain the same as was being done at the time suit was brought, and as they were now doing, without their first having acquired the right to so construct and maintain the same from the owner of the fee, or without obtaining the right therefor by proceedings under the power of eminent domain on payment of due compensation to the owner of the land therefor; and,

That under Article V of the Amendments to the Constitution of the United States the property in question could not lawfully be taken for the public use to which it was appropriated without just compensation having been made therefor to the owner or without due process of law.

The plaintiff also requested this instruction: "The construction of this pier was in violation, and the maintaining of the same was in violation of, said Article V of the Amendments to the Constitution of the United States in this, that it appears from the testimony in the case that the same was appropriated without due process of law, and the same was taken and

devoted to a public use without the consent of the owner thereof, and without just compensation therefor, and that the taking possession of the land of the plaintiff, as appears by the record, was in violation of said Article V; and that the taking possession of the land of the plaintiff and the construction of the pier thereon, in the manner shown in this case, the effect of which was to deprive him of all egress from his said land to the navigable water, the natural navigable water of the stream, and to prevent him using his said property by passing over or across said pier, as shown in the testimony of the case, was in violation of said Article V of Amendments to the Constitution of the United States, and as depriving the owner thereof of his property without due process of law, and without just compensation, and without his consent."

These instructions were severally refused, and to that action of the court the plaintiff excepted.

In charging the jury the court stated that the United States District Attorney had suggested in writing that the property in controversy, the title and possession of which were the subjects of this litigation, was and for many years had been in the possession of the United States through its officers and agents; that it was held for public uses in connection with the commerce and navigation of the Great Lakes; that the nominal defendant had no personal interest in the matter; that his physical possession of the premises was in his official capacity and in law the possession of the United States; that the United States had always held title to the said land, and now holds possession under its claim of title; that this action was in effect an action against the United States Government, which in its sovereign capacity could not be sued; and for these reasons the District Attorney asked that all proceedings be stayed and the suit dismissed.

A verdict for the defendant was directed on the ground that, in legal effect, the action was against the United States and that a judgment for the plaintiff would be one against the Government and its property.

In the Supreme Court of the State the failure of the trial court to charge the jury as requested by the plaintiff, and the direction to the jury to return a verdict for the defendant, were assigned for error. That court, all the Justices concurring, held that the action was not against the United States, but affirmed the judgment upon other grounds.. It said: "When one in the actual possession of property defends his right of possession upon the ground that the government, State or national, has placed him in possession, he must show that the right of the government is paramount to the right of the plaintiff, or judgment will go against him. This point has been settled by the decision of the Supreme Court of the United States rendered May 10, 1897. *Tindal* v. *Wesley*, 167 *U. S.* 204. In that case the authorities upon this point are reviewed at length, including the case of *Stanley* v. *Schwalby*, 162 *U. S.* 255, upon which defendant mainly relies.

The United States Government took possession of the submerged land of the plaintiff for the purpose of erecting thereon piers in aid of the immense navigation upon the Great Lakes and the rivers connecting them. That the improvements made were necessary to aid and protect this navigation is established beyond dispute. Had the Government the right to make these improvements upon the submerged land without compensation to the adjoining owner? It is conceded that under the law of Michigan the title to submerged land is in the adjoining owner to the thread of the stream. It is insisted in behalf of the plaintiff that the Government possesses no right to so use his land, although submerged, and although necessary to so use it in aid of navigation, as to cut off his access to the open water. It is contended on the other hand that this title to submerged lands along navigable waters, and the right of access thereto, are subject to the paramount right of the United States to use this land in such manner as they shall determine to be necessary in aid of navigation. The Court of Appeals was unanimous in its opinion against the plaintiff's claim. In a very able opinion delivered by Judge Lurton the facts are clearly stated, the authorities cited, and we think the conclusion there reached is the correct one. We therefore deem it unnecessary for us to enter into a long discussion of the law and the authorities. The case of *Hawkins' Point Lighthouse*, 39 *Fed. Rep.* 77, appears to be exactly in point, and to rule the present case. We think the conclusion reached by the court below was a correct one, although it gave a wrong reason." 113 *Mich.* 565.

The Hawkins Point Lighthouse case referred to in the opinion of the State court was ejectment brought in a Circuit Court of the United States against a government keeper of a lighthouse to recover possession of such house, erected in the Patapsco River, a public navigable water of the United States, by the Lighthouse Board in pursuance of acts of Congress. There was no condemnation for public use of the lands upon which the lighthouse rested nor was any compensation made to any one for the site. The plaintiff was the owner of the upland, but had not, in the exercise of his riparian right, improved out into the water in front of his land. The court, speaking by Judge Morris, held that the plaintiff was not entitled to recover, saying: "While the submerged land remains a part of the bed of the river it is not private property in the sense of the Fifth Amendment to the Federal Constitution. As was declared in *Gilman* v. *Philadelphia*, 3 *Wall.* 725, the navigable waters 'are the public property of the nation, and subject to all the requisite legislation by Congress.' In the hands of the State or of the State's grantee the bed of a navigable river remains subject to an easement of navigation, which the General Government can lawfully enforce, improve and protect. It is by no means true that any dealing with a navigable stream which impairs the value of the rights of riparian owners gives

them a claim for compensation. The contrary doctrine, that, in order to develop the greatest public utility of a waterway, private convenience must often suffer without compensation, has been sanctioned by repeated decisions of the Supreme Court. The following are cases all involving that proposition: *The Blackbird Creek Case*, 2 *Pet.* 245; *Gilman* v. *Philadelphia*, 3 *Wall.* 713; *Pound* v. *Turck*, 95 *U. S.* 459; *Wisconsin* v. *Duluth*, 96 *U. S.* 379; *South Carolina* v. *Georgia*, 93 *U. S.* 4. If it were made apparent to Congress that any extension of the plaintiff's present shore line into the river tended to impair the navigability of the stream or its use as a highway of commerce, Congress could authorize the agents of the United States to establish the present shore as the line beyond which no structures of any kind could be extended, and the plaintiff would have no claim for compensation. If the plaintiff could thus lawfully be prevented from appropriating to his private use any part of the submerged land lying in front of his shore line, and the whole of it be kept subservient to the easement of navigation, how can it be successfully claimed that he must be paid for the small portion covered by the lighthouse 200 feet from the shore, which has been taken for a use as strictly necessary to safe navigation as the improved channel itself? The Court of Appeals of Maryland, whenever called upon to declare the nature of the title of the State and its grantees in the land at the bottom of navigable streams, has uniformly held that the soil below high-water mark was as much a part of the *jus publicum* as the stream itself." 39 *Fed. Rep.* 77.

The plaintiff, Scranton, has assigned various grounds of error. These grounds are substantially those embodied in his requests for instructions in the trial court, and which were insisted upon in the Supreme Court of the State.

Mr. Justice HARLAN delivered the opinion of the Court. After stating the facts as above reported, he proceeded:

1. The Government insists that ejectment is not the proper remedy for a riparian owner to secure the removal of a structure that interferes with access by him from his fast land to navigable water. A sufficient answer to this objection is that the State court recognized the present action as a proper one under the laws of Michigan for the relief sought by the plaintiff. We have therefore to consider only the controlling questions of a Federal nature presented by the record and decided by the State court.

2. The Supreme Court of the State correctly held that the trial court erred in directing a verdict for the defendant upon the ground that a judgment against him would in legal effect be a judgment against the United States. It is true the defendant Wheeler insisted that the action of which the plaintiff complained was taken by him under the authority of the United States. But this fact was not sufficient to defeat the suit. If the plaintiff was entitled

to access from his land to navigable water, and if the defendant stood in the way of his enjoying that right, then the court was under a duty to inquire whether the defendant had or could have any authority in law to do what he had done; and the suit was not to be deemed one against the United States because in the consideration of that question it would become necessary to ascertain whether the defendant could constitutionally acquire from the United States authority to obstruct the plaintiff's access to navigable water in front of his land without making or securing compensation to him. The issue, in point of law, was between the individual plaintiff and the individual defendant, and the United States not being a party of record a judgment against Wheeler will not prevent it from instituting a suit for the direct determination of its rights as against the plaintiff. This subject has been examined by the court in numerous cases, the most recent one being *Tindal* v. *Wesley*, 167 *U. S.* 204, 222, 223. In that case—which was a suit to recover real property in South Carolina held by the defendants, as they insisted, in their capacities as officers of the State and only for the State—it was said that "the Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of a citizen without authority of law. And when such officers or agents assert that they are in rightful possession, they must make good that assertion when it is made to appear in a suit against them as individuals that the legal title and right of possession is in the plaintiff." Again: "It is said that the judgment in this case may conclude the State. Not so. It is a judgment to the effect only that as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff; that the assertion by the defendants of a right to remain in possession is without legal foundation. The State not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim."

These principles are applicable to the present case, and show that it is not within the rule forbidding a suit against the United States except with its consent.

3. The vital question therefore is the one heretofore mentioned, namely, whether the prohibition in the Constitution of the United States of the taking of private property for public use without just compensation has any application to the case of an owner of land bordering on a public navigable river whose access from his land to navigability is permanently lost

by reason of the construction of a pier resting on submerged lands away from but in front of his upland, and which pier was erected by the United States not with any intent to impair the rights of riparian owners but for the purpose only of improving the navigation of such river.

Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the Fifth Amendment of the Constitution; and of course in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use. What is private property within the meaning of that Amendment, or what is a taking of private property for public use, is not always easy to determine. No decision of this court has announced a rule that will embrace every case. But what has been said in some cases involving the general question will assist us in determining whether the present plaintiff has been denied the protection secured by the constitutional provision in question.

In *Pumpelly* v. *Green Bay Company*, 13 *Wall.* 166, 181, the court construed a provision of the Constitution of Wisconsin declaring that "the property of no person shall be taken for public use without just compensation therefor;" observing that it was a provision almost identical in language with the one relating to the same subject in the Federal Constitution. In that case it appeared that a public improvement in a navigable water was made under local statutory authority, whereby the plaintiff's land was permanently overflowed and its use for every purpose destroyed. Referring to some adjudged cases which went, as the court observed, beyond sound principle, it was said that, "it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle."

That case was relied upon in *Transportation Co.* v. *Chicago*, 99 *U. S.* 635, 642, as establishing the invalidity of certain municipal acts looking to the improvement of a public highway. But this court said that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority." It was observed in the same case that the extremest qualification of the doctrine was that found in Pumpelly's case, and that case was referred to as holding nothing more than that "the permanent flooding of private property

may be regarded as a 'taking,'" because there would be in such case "a physical invasion of the real estate of the owner, and a practical ouster of his possession."

In *Monongahela Navigation Co.* v. *United States*, 148 *U. S.* 312, 341, 343 there was an actual taking of certain locks and dams which had been constructed and maintained, under competent authority, by a navigation company, and the question was whether the franchise to take tolls for the use of the locks was to be deemed a part of the property taken for which compensation must be made. This court held that it was, remarking: "The franchise is a vested right. The State has the power to grant it. It may retake it, as it may take other private property, for public uses, on the payment of just compensation. A like, though a superior, power exists in the National Government. It may take it for public purposes, and take it even against the will of the owner; but it can no more take the franchise which the State has given than it can any private property belonging to an individual." Again, in the same case: "It is also suggested that the Government does not take this franchise; that it does not need any authority from the State for the exaction of tolls, if it desires to exact them; that it only appropriates the tangible property, and then either makes the use of it free to all, or exacts such tolls as it sees fit, or transfers the property to a new corporation of its own creation, with such a franchise to take tolls as it chooses to give. But this franchise goes with the property; and the Navigation Company, which owned it, is deprived of it. The Government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the Government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived."

But the case most analagous to the present one is that of *Gibson* v. *United States*, 166 *U. S.* 269, 271, 275, 276. That was an action in the Court of Claims to recover damages resulting from the construction of a dike by the United States in the Ohio River near the plaintiff's farm on Neville Island, a short distance below Pittsburg.

From the finding of facts in that case it appears that at the time the dike was constructed Mrs. Gibson's farm was in a high state of cultivation, with a frontage of 1,000 feet on the main channel of the Ohio River, and had a landing that was used in shipping products from and in bringing supplies to it, and that there was no other landing on the farm which the owner could use in shipping products and in receiving supplies; that the dike was constructed under the authority of an act of Congress appropriating money for improving the Ohio River; that the owner was unable

to use the landing for the shipment of products from and supplies to the farm for the greater part of the gardening season on account of the dike obstructing the passage of boats, and could only use the landing at a high stage of water; that after the dike was made she could not, during the ordinary stage of water, ship products from or receive supplies for her farm, without going over the farms of her neighbors to reach another landing; and that in consequence of the construction and maintenance of the dike the plaintiff's farm had been reduced in value from $600 to $150 or $200 per acre. It was further found that the plaintiff's access to the navigable part of the river was not entirely cut off; that at a nine-foot stage of water, which frequently occurred during November, December, March, April and May, she could get into her dock in any manner, while from a three-foot stage of water she could communicate with the navigable channel through a chute, and at any time haul out to the channel by wagon; that no water was thrown back on the land by the building of the dike; and that the dike itself did not come into physical contact with the land and was constructed in the exercise of a claimed right to improve the navigation of the river.

This court held that the plaintiff had no cause of action against the United States. It said: "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individuals owners under them, it is always subject to the servitude in respect to navigation created in favor of the Federal Government by the Constitution"—citing *South Carolina* v. *Georgia*, 93 *U. S.* 4; *Shively* v. *Bowlby*, 152 *U. S.* 1; *Eldridge* v. *Trezevant*, 160 *U. S.* 452. Again, in the same case: "The Fifth Amendment to the Constitution of the United States provides that private property shall not 'be taken for public use without just compensation.' Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power." "Moreover," the court said, "riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard. The legislative authority for these works consisted simply in an appropriation for their construction, but this was an assertion of a right belonging to the Government, to which riparian property was subject, and not of a right to appropriate private property, not burdened with such servitude, to public purposes."

In the light of these adjudications can it be held that Scranton, the plaintiff, is entitled, by reason of the construction of the pier in question, to compensation for the destruction of his right, as riparian owner, of access from his land to the navigable part of the river immediately in front of it?

It is said that he is so entitled in virtue of the decision in *Yates* v. *Milwaukee*, 10 *Wall.* 497, 504, 505. The report of that case shows that Yates owned a wharf on a navigable river within the limits of the city of Milwaukee and that the city by an ordinance declared the wharf to be a nuisance and ordered it to be abated. There was no proof whatever in the record that the wharf was in fact an obstruction to navigation or a nuisance except the declaration to that effect in the city ordinance; and Yates brought suit to enjoin interference with it by the city. This court held that the mere declaration by the city that Yates' wharf was a nuisance did not make it one, saying: "It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself." This, as this court said in *Shively* v. *Bowlby*, 152 *U. S.* 1, 40, was quite sufficient to dispose of the case in Yates' favor, and indicated the point adjudged. A proper disposition of the case required nothing more to be said. But the opinion of the court went further, and after observing, upon the authority of *Dutton* v. *Strong*, 1 *Black*, 25, and *Railroad Co.* v. *Schurmier*, 7 *Wall.* 272, that a riparian owner is entitled to access to the navigable part of the river from the front of his lot, subject to such general rules and regulations as the legislature might prescribe for the protection of the rights of the public, said: "This riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, if once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation."

The decision in *Yates* v. *Milwaukee* cannot be regarded as an adjudication upon the particular point involved in the present case. That, as we have seen, was a case in which the riparian owner had in conformity with law erected a wharf in front of his upland in order to have access to navigable water. The city of Milwaukee attempted arbitrarily and capriciously to destroy or remove the wharf that had lawfully come into existence and was not shown, in any appropriate mode, to have been an obstruction to navigation. It was a case in which a municipal corporation intended the actual destruction of tangible property belonging to a riparian owner and lawfully used by him in reaching navigable water, and not, like this, a case of the exercise in a proper manner of an admitted governmental power resulting indirectly or incidentally in the loss of the citizen's right of access to navigation—a right never exercised by him in the construction of a wharf before the improvement in question was made by the Government.

While the present case differs in its facts from any case heretofore decided by this court, it is embraced by principles of constitutional law that have become firmly established.

The Constitution invests Congress with the power to regulate commerce with foreign nations and among the several States. This power includes the power to prescribe "the rule by which commerce is to be governed;" " is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" and "comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes.'" *Gibbons* v. *Ogden*, 9 *Wheat.* 1, 196, 197.

In *Gilman* v. *Philadelphia*, 3 *Wall.* 713, 724, the court said: "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress."

In *South Carolina* v. *Georgia*, 93 *U. S.* 1, 11, 12, the court said that Congress "may build lighthouses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage."

In *County of Mobile* v. *Kimball*, 102 *U. S.* 691, 696, the court, observing that the power of Congress to regulate commerce was without limitation, said: "It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries and between the citizens of the several States, and to adopt measures to promote its growth and insure its safety. And as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the States connecting with them, falls within the power."

In *Stockton, Attorney General* v. *Baltimore & N. Y. R. R. Co.*, 32 *Fed. Rep.* 9, 20, Mr. Justice Bradley, holding the Circuit Court, said: "Such being the character of the State's ownership of the land under water—an ownership held, not for the purpose of emolument, but for public use, especially the public use of navigation and commerce—the question arises whether it is a kind of property susceptible of pecuniary compensation, within the meaning of the Constitution. The Fifth Amendment provides only that *private property* shall not be taken without compensation, making no reference to public property. But, if the phrase may have an application broad enough to include all property and ownership, the question would still arise whether the appropriation of a few square feet of the river bottom to the foundation of a bridge, which is to be used

for the transportation of an extensive commerce in aid and relief of that afforded by the waterway, is at all a diversion of the property from its original public use. It is not so considered when sea walls, piers, wing-dams and other structures are erected for the purpose of aiding commerce by improving and preserving the navigation. Why should it be deemed such when (without injury to the navigation) erections are made for the purpose of aiding and enlarging commerce beyond the capacity of the navigable stream itself, and of all the navigable waters of the country? It is commerce, and not navigation, which is the great object of constitutional care. The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams, and these are so completely subject to the control of Congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States has or has not the theoretical ownership and dominion in the waters, or the land under them; it has, what is more, the regulation and control of them for the purposes of commerce. So wide and extensive is the operation of this power that no State can place any obstruction in or upon any navigable waters against the will of Congress, and Congress may summarily remove such obstructions at its pleasure. And all this power is derived from the power 'to regulate commerce.' Is this power stayed when it comes to the question of erecting a bridge for the purposes of commerce across a navigable stream? We think not. We think that the power to regulate commerce between the States extends, not only to the control of the navigable waters of the country, and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges and all other instrumentalities of commerce which, in the judgment of Congress, may be necessary or expedient."

As much was said in argument about the decisions in New York it may be well here to refer to some of the rulings of the highest court of that State. In *Rumsey et al.* v. *New York and New England Railroad Co.*, 133 *N. Y.* 79, 85, 89, the Court of Appeals of New York, referring to the prior case of *Gould* v. *Hudson River Railroad Co.*, 6 *N. Y.* 522, said: "It was there held that the owner of lands on the Hudson River has no private right or property in the waters or the shore between high and low-water mark, and, therefore, is not entitled to compensation from a railroad company which, in pursuance of a grant from the legislature, constructs a railroad along the shore, between high and low-water mark, so as to cut off all communications between the land and the river otherwise than across the railroad. It is believed that this proposition is not supported by any other judicial decision in this State, and if we were dealing with the question now as an original one, it would not be difficult to show that the

judgment in that case was a departure from precedent and contrary to reason and justice." Again, in the same case: "It must now, we think, be regarded as the law in this State that an owner of land on a public river is entitled to such damages as he may have sustained against a railroad company that constructs its road across his water front and deprives him of access to the navigable part of the stream, unless the owner has granted the right, or it has been obtained by the power of eminent domain. This principle cannot, of course, be extended so as to interfere with the right of the State to improve the navigation of the river, or with the power of Congress to regulate commerce under the provisions of the Federal Constitution."

But in a later case in New York relating to this subject—*Sage* v. *The Mayor*, 154 *N. Y.* 61, 69—the Court of Appeals, after observing that the court in *Rumsey et al.* v. *New York and New England Railroad Co.* had been careful to say that the principle announced by it was not to be extended so as to interfere with the right of the State to improve the navigation of the river, or with the power of Congress to regulate commerce under the provisions of the Federal Constitution, said: "While we think it is a logical deduction from the decisions in this State that, as against the general public, through their official representatives, riparian owners have no right to prevent important public improvements upon tidewater for the benefit of commerce, the principle upon which the rule rests, although sometimes foreshadowed, has not been clearly set forth. Although, as against individuals or the unorganized public, riparian owners have special rights to the tideway that are recognized and protected by law, as against the general public, as organized and represented by government, they have no rights that do not yield to commercial necessities, except the right of pre-emption, when conferred by statute, and the right to wharfage, when protected by a grant and covenant on the part of the State, as in the Langdon [93 *N. Y.* 129] and Williams [105 *N. Y.* 419] cases. I think that the rule rests upon the principle of implied reservation, and that in every grant of lands bounded by navigable waters where the tide ebbs and flows, made by the crown or the State as trustees for the public, there is reserved by implication the right to so improve the water front as to aid navigation for the benefit of the general public, without compensation to the riparian owner. The implication springs from the title to the tideway, the nature of the subject of the grant and its relation to navigable tidewater, which has been aptly called the highway of the world. The common law recognizes navigation as an interest of paramount importance to the public."

All the cases concur in holding that the power of Congress to regulate commerce, and therefore navigation, is paramount, and is unrestricted except by the limitations upon its authority by the Constitution. Of

course, every part of the Constitution is as binding upon Congress as upon the people. The guarantees prescribed by it for the security of private property must be respected by all. But whether navigation upon waters over which Congress may exert its authority requires improvement at all, or improvement in a particular way, are matters wholly within its discretion; and the judiciary is without power to control or defeat the will of Congress, so long as that branch of the Government does not transcend the limits established by the supreme law of the land. Is the broad power with which Congress is invested burdened with the condition that a riparian owner whose land borders upon a navigable water of the United States shall be compensated for his right of access to navigability whenever such right ceases to be of value solely in consequence of the improvement of navigation by means of piers resting upon submerged lands away from the shore line? We think not. The question before us does not depend upon the inquiry whether the title to the submerged lands on which the New South Pier rests is in the State or in the riparian owner. It is the settled rule in Michigan that "the title of the riparian owner extends to the middle line of the lake or stream of the inland waters." *Webber* v. *The Pere Marquette Boom Co.*, 62 *Mich.* 636, *and authorities there cited.* But it is equally well settled in that State that the rights of the riparian owner are subject to the public easement or servitude of navigation. *Lorman* v. *Benson*, 8 *Mich.* 18, 32; *Ryan* v. *Brown*, 18 *Mich.* 195, 207. So that whether the title to the submerged lands of navigable waters is in the State or in the riparian owners, it was acquired subject to the rights which the public have in the navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation. In *Lorman* v. *Benson*, above cited, the Supreme Court of Michigan, speaking by Justice Campbell, declared the right of navigation to be one to which all others were subservient. The learned counsel for the plaintiff frankly states that compensation cannot be demanded for the *appropriation* of the submerged lands in question and that the United States under the power to regulate commerce has an unquestioned right to *occupy* them for a lawful purpose and in a lawful manner. This must be so—

certainly in every case where the use of the submerged lands is necessary or appropriate in improving navigation. But the contention is that compensation must be made for the loss of the plaintiff's access from his upland to navigability incidentally resulting from the occupancy of the submerged lands, even if the construction and maintenance of a pier resting upon them be necessary or valuable in the proper improvement of navigation. We cannot assent to this view. If the riparian owner cannot enjoy access to navigability because of the improvement of navigation by the construction away from the shore line of works in a public navigable river or water, and if such right of access ceases alone for that reason to be of value, there is not, within the meaning of the Constitution, a *taking* of *private* property for public use, but only a consequential injury to a right which must be enjoyed, as was said in the Yates case, "in due subjection to the rights of the public"—an injury resulting incidentally from the exercise of a governmental power for the benefit of the general public, and from which no duty arises to make or secure compensation to the riparian owner. The riparian owner acquired the right of access to navigability subject to the contingency that such right might become valueless in consequence of the erection under competent authority of structures on the submerged lands in front of his property for the purpose of improving navigation. When erecting the pier in question, the Government had no object in view except, in the interest of the public, to improve navigation. It was not designed arbitrarily or capriciously to destroy rights belonging to any riparian owner. What was done was manifestly necessary to meet the demands of international and interstate commerce. In our opinion, it was not intended that the paramount authority of Congress to improve the navigation of the public navigable waters of the United States should be crippled by compelling the Government to make compensation for the injury to a riparian owner's right of access to navigability that might incidentally result from an improvement ordered by Congress. The subject with which Congress dealt was navigation. That which was sought to be accomplished was simply to improve navigation on the waters in question so as to meet the wants of the vast commerce passing and to pass over them. Consequently the agents designated to perform the work ordered or authorized by Congress had the right to proceed in all proper ways without taking into account the injury that might possibly or indirectly result from such work to the right of access by riparian owners to navigability.

It follows from what has been said that the pier in question was the property of the United States, and that when the defendant refused to plaintiff the privilege of using it as a wharf or landing place he violated no right secured to the latter by the Constitution.

We are of opinion that the court below correctly held that the plaintiff had no such right of property in the submerged lands on which the pier

in question rests as entitles him, under the Constitution, to be compensated for any loss of access from his upland to navigability resulting from the erection and maintenance of such pier by the United States in order to improve and which manifestly did improve the navigation of a public navigable water.

The judgment of the Supreme Court of Michigan is therefore

Affirmed.

Mr. Justice BREWER concurred in the result.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 9—October Term, 1900.

Gilmore G. Scranton, Plaintiff in Error, vs. Eben S. Wheeler. } In error to the Supreme Court of the State Michigan.

[November 12, 1900.]

Mr. Justice Shiras dissenting.

Gilmore G. Scranton, the plaintiff in error, derived his title to a tract of land, known as Private Land Claim No. 3, and fronting on the St. Mary's River, a stream naturally navigable, under a patent of the United States granted on October 6th, 1874.

It must be regarded as the settled law of this court that grants by Congress of portions of the public lands, bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution of the United States.

In *Shively* v. *Bowlby*, (152 U. S. 1,) there was a controversy between parties claiming under a patent of the United States for a donation land claim bounded by the Columbia River, and parties claiming under deeds from the State of Oregon for lands between the lines of low and ordinary high tide of the Columbia River. It was held by the Supreme Court of Oregon, (22 Oregon, 427,) that the lands in question, lying between the uplands and the navigable channel of the Columbia River, belonged to the State of Oregon, and that its deed to such lands conveyed a valid title.

The case was brought to this court, where the judgment of the Supreme Court of Oregon was affirmed. The opinion of this court contains an elaborate review of the English authorities expounding the common law, of decisions of the several States, and of the previous decisions of this court. The conclusion reached was that the title and rights of riparian or littoral proprietors in the soil below high-water mark are governed by the local laws of the several States, subject, of course, to the rights granted to the United States by the Constitution. The theory on which Congress has acted in this matter was thus stated by the court:

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high-water mark, may be taken up by actual occu-

pants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community."

The reasoning and conclusions of this case were followed and applied in the subsequent cases of *Mann* v. *Tacoma Land Company*, 153 U. S. 273; *Water Power Co.* v. *Water Commissioners*, 168 U. S. 349; and *Morris* v. *United States*, 174 U. S. 196.

It cannot be said that any title to the submerged land became vested in the plaintiff in error, as against the State or its grantees, by reason of the fact that it is the law in Michigan, in the case of lands abutting on navigable streams, titles to which are derived from the State, that such titles extend to and embrace submerged lands as far as the thread of the stream. It has never been held in Michigan that that doctrine applied to the case of titles derived from the United States.

Shively v. *Bowlby* and *Mann* v. *Tacoma Land Company*, above cited, were both cases in which it was held that titles derived under grants by the United States to lands abutting on navigable waters did not avail as against the State and subsequent grantees.

It is not pretended that the State of Michigan ever made any grant of these submerged lands to the plaintiff in error; but, on the contrary, the State in 1881, transferred all its rights in the St. Mary's Canal and the public works thereon, with all its appurtenances, to the United States. (Howell's Stat. sec. 5502.)

This would seem to dispose of the claim to the land occupied by the pier in the river in front of Private Land Claim No. 3. And, indeed, the counsel for the plaintiff in error, in their briefs filed of record in this court, conceded that, under the facts of this case, compensation could not be demanded for the appropriation of the submerged lands, and restricted their argument to the question of the plaintiff's right of access to the navigable stream bounding his property. But the opinion in this case, while correctly stating that the question before us is as to the right of the plaintiff in error to be indemnified for the total destruction of his access to the river, does not confine the discussion to that question. Not regard-

ing the fact that the plaintiff in error has failed to show any title to the submerged land, and that no such claim is urged on his behalf in this court, it is said in the opinion that—

"The question before us does not depend upon the inquiry whether the title to the submerged lands on which the new South Pier rests is in the State or in the riparian owner. It is the settled rule in Michigan that 'the title of the riparian owner extends to the middle line of the lake or stream of the inland waters.' (*Webber* v. *Pere Marquette Boom Co.*, 62 Mich. 636, and authorities there cited.) But it is equally well settled in that State that the rights of the riparian owner are subject to the public easement or servitude of navigation. (*Lowman* v. *Benson*, 8 Mich. 18; *Ryan* v. *Brown*, 18 Mich. 195.)

"So that whether the title to the submerged lands of navigable waters is in the State or in the riparian owners, such title was taken subject to the rights which the public have in the navigation of the waters in question. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is strictly consistent with such use, and infringes no right of the riparian owner. Whatever the interest of a riparian owner in the submerged lands in front of his upland, his title is not as full and complete as his title acquired to fast land which has no direct connection with the navigation of the river or water on which it borders. It is not a title at his absolute disposal, but is to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as is consistent with or demanded by the public right of navigation. The learned counsel for the plaintiff frankly states that compensation cannot be demanded for the appropriation of the submerged lands in question, and that the United States, under the power to regulate commerce, has an unquestioned right to occupy them for a lawful purpose and in a lawful manner. This must be so—certainly in every case where the use of the submerged lands is necessary for the improvement of navigation."

It is, I think, impossible to read this language, particularly when read in connection with other passages in the opinion, without understanding it to assert that where the riparian owner has a title to lands under navigable waters adjacent to his upland, such land may be taken into the exclusive possession of the government by the erection of a public work without compensation; and that, even if the State court should hold that the riparian owner had a title to the submerged lands, and was entitled to be compensated for their appropriation for a public purpose connected with navigation, it would be the duty of this court to overrule such a decision.

As, for the reasons already mentioned, no such question is now before us, and, therefore, those portions of the opinion of the majority cannot justly be hereafter regarded as furnishing a rule of decision in such a case, yet I must be permitted to disavow such a proposition. When the case does arise, I incline to think it can be shown, upon principle and authority, that private property in submerged lands cannot be taken and exclusively occupied for a public purpose without just compensation. At all events,

I submit that it will be in time to decide so important a question when it necessarily arises, and when the rights of the owner of the property have been asserted and defended in argument.

The real question then in this case is whether an owner of land abutting on a public navigable river, but whose title does not extend beyond the high-water line, is entitled to compensation "because of the permanent and total obstruction of his right of access to navigability resulting from the maintenance of a pier constructed by the United States in the river opposite such land for the purpose of improving navigation."

To answer such a question, the *nature* of the riparian right of access must be first determined. That he has such a right all must admit. But does his right constitute "private property" within the meaning of the Constitution, or is it in the nature of a license, or prescription, of which he can be deprived for the benefit of the public without being entitled to compensation?

The term "property," standing alone, includes everything that is the subject of ownership. It is a *nomen generalissimum*, extending to every species of valuable right and interest, including things real and personal, easements, franchises, and other incorporeal hereditaments. (*Boston R. Co.* v. *Salem*, 2 Gray, 35; Shaw, C. J.)

"The term 'property,' as applied to lands, comprehends every species of title inchoate or complete. It is supposed to embrace those rights which lie in contract, those which are executory, as well as those which are executed." (*Soulard et al* v. *United States*, 4 Pet. 511; Marshall, C. J.)

Private property is that which is one's own; something that belongs or inheres exclusively in an individual person.

The right which a riparian owner has in a navigable stream when traveling upon it, or using it for the purpose of navigation, must be distinguished from his right to reach navigable water from his land and to reach his land from the water. The former right is one which belongs to him as one of the public, and its protection is found in indictments at the suit of the public—sometimes, in special circumstances, in proceedings in equity for the use of all concerned. Being a public right, compensation cannot be had by private parties for any injury affecting it. The latter right is a private one, incident to the ownership of the abutting property, in the enjoyment of which such owner is entitled to the protection of private remedies afforded by the law against wrongdoers, and for which, if it is taken from him for the benefit of the public, he is entitled to compensation.

This distinction has always been recognized by the English courts.

Rose v. *Groves*, (5 M. & G. 613,) was a case where an innkeeper was held entitled to recover damages against a defendant for wrongfully preventing the access of guests to his home situated on the river Thames by placing timbers in the river opposite the inn, and wherein, meeting the contention

that the plaintiff had no private right of action, but that his remedy was by proceedings for a public nuisance, Chief Justice Tindal said: "This is not an action for obstructing the river, but for obstructing the access to the plaintiff's home on the river."

In *Lyon* v. *Fishmongers' Co.*, (1 App. Cas. 662,) Lord Cairns said:

"As I understand the judgment in *Rose* v. *Groves*, it went not upon the ground of public nuisance, accompanied by particular damage to the plaintiff, but upon the principle that a private right of the plaintiff had been interfered with. The plaintiff, an innkeeper on the banks of a navigable river, complained that the access of the public to his home was obstructed by timber which the defendant had placed in the river; and it would be the height of absurdity to say that a private right was not interfered with, when a man who has been accustomed to enter his home from a highway finds his doorway made impassable, so that he no longer had access to his home from the public highway. This would equally be a private injury to him, whether the right of the public to pass and repass along the highway were or were not at the same time interfered with. Chief Justice Tindall, in *Rose* v. *Graves*, put the case distinctly upon the footing of an infringement of a private right. He says: 'A private right is set up on the part of the plaintiff, and to that he complains that an injury has been done;' and then, after stating the facts, adds: 'It appears to me, therefore, that the plaintiff is not complaining of a public injury.'"

Elsewhere, in the same case, Lord Cairns said:

"Independently of the authorities, it appears to me quite clear, that the right of a man to step from his own land into a highway is something quite different from the public right of using the highway.

"Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *qua* owner or occupier of any lands on the bank; nor is it a right which *per se* he enjoys in a manner different from any other member of the public.

"But when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place, and it becomes a form of enjoyment of the land, the disturbance of which may be vindicated in damages by an action or restrained by an injunction. It is, as was decided by the House of Lords in the cases to which I have referred, a portion of the valuable enjoyment of the land, and any work which takes it away is held to be 'an injurious affecting of the land,' that is to say, the occasioning to the land of an *injuria* or an infringement of right. The taking away of river frontage, interrupting the access between the wharf and the river, may be an injury to the public right of navigation, but it is not the less an injury to the owner of the wharf, which, in the absence of parliamentary authority, would be compensated by damages or altogether prevented." (1 App. Cas. 671.)

This distinction between the right of immediate access from the abutter's property to and from a highway, whether a street or a navigable stream, and an injury arising after he reaches it and which is common to him and the rest of the public, is recognized by the courts of the States, and the

former right is held to be a valuable one, which cannot be destroyed without compensation.

Thus, in *Haskell* v. *New Bedford*, (108 Mass. 208,) it was held that where a sewer constructed by the city of New Bedford discharged filth into the dock of the plaintiff obstructing his use of it, it created a private nuisance to the plaintiff upon his own land for which he could maintain an action for the special damages thereby occasioned to him, without regard to the question whether it was also a nuisance to the public, Mr. Justice Gray, now a justice of this court, saying: "The plaintiff's title extended, by virtue of the statute of 1806, to the channel of the river; and the filling up of the dock impaired his use and enjoyment of it for the purpose for which it had been constructed and actually used; and the injury thus done to him differed, not only in degree but in kind, from the injury to the public by interference with navigation. Neither this special injury to him, nor that occasioned to his premises by making them offensive and unhealthy was merged in the common nuisance"—and citing, among other cases, *Rose* v. *Groves*, one of the English cases above mentioned.

And in *Brayton* v. *Fall River*, (113 Mass. 218,) it was held that while the owner of a wharf upon a tide-water creek cannot maintain an action for an illegal obstruction to the creek, that being a common damage to all who use it, yet for an obstruction adjoining the wharf which prevents vessels from lying in it in the accustomed manner, this being a particular damage, he can maintain an action.

In *Delaplaine* v. *C. & N. Ry. Co.*, (42 Wis. 214,) the Supreme Court of Wisconsin held that—

"While the riparian proprietor only takes to the water line, it by no means follows, nor are we willing to admit, that he can be deprived of his riparian rights without compensation. As proprietor of the adjoining land, and as connected with it, he has the right of exclusive access to and from the waters of the lake at that particular place; he has the right to build piers and wharves in front of his land out to navigable waters in aid of navigation, not interfering with the public use. These are private rights incident to the ownership of the shore, which he possesses distinct from the rest of the public. . . . .

"It is evident from the nature of the case that these rights of user and of exclusion are connected with the land itself, grow out of its location, and cannot be materially abridged or destroyed without inflicting an injury upon the owner which the law should redress. It seems unnecessary to add the remark that these riparian rights are not common to the citizens at large, but exist as incidents to the right of the soil itself adjacent to the water. In other words, according to the uniform doctrine of the best authority, the foundation of riparian rights, *ex vi termini*, is the ownership of the bank or shore." "These riparian rights are undoubted elements in the value of property thus situated. If destroyed, can anyone seriously claim that the plaintiffs have not suffered a special damage in respect to their property, different both in degree and kind from that sustained by the general public? It seems to us not."

In *Brisbane* v. *St. Paul R. R. Co.*, (23 Minn. 114,) it was held by the Supreme Court of Minnesota that the State could not give a railroad company the right to occupy a riparian front without making compensation for the injury to riparian rights. The court, after citing cases in this court, said:

"According to the doctrine of these decisions the plaintiff possessed the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain, for his own and the public use, suitable landing places, wharves, &c. . . . The rights which thus belonged to him as ripairan owner of the abutting premises were valuable property rights, of which he could not be divested, except by due process of law, and, if for public purposes, upon just compensation."

In *The Indiana, &c., Ry. Co.* v. *Eberle*, (110 Ind. 445,) the Supreme Court of Indiana said:

"Whatever may be the rule of decision elsewhere, nothing is better settled in this State than that the owners of lots abutting on a street may have a peculiar and distinct interest in the easement in the street in front of their lots. This interest includes the right to have the street kept open and free from any obstruction which prevents or materially interferes with the ordinary means of egress from and ingress to the lots. It is distinguished from the interest of the general public, in that it becomes a right appendant and legally adhering to the contiguous grounds and the improvements thereon as the owner may have adapted them to the street. To the extent that the street is a necessary and convenient means of access to the lot, it is as much a valuable property right as the lot itself. It cannot, therefore, be perverted from the uses to which it was originally dedicated, nor devoted to uses inconsistent with street purposes, without the abutting owner's consent, until compensation be made according to law for any injury or damage which may directly result from such interference."

This right of the owner of a lot abutting on a street to free access to and from the street, which right is analogous to the one we are here considering, has been frequently considered by the State courts, and some of the conclusions reached are thus stated in Dillon's Municipal Corporations, vol. 2, sec. 656, (4th ed.):

"The full conception of the true nature of a public street in a city, as respects the rights of the public on the one hand, and the rights of the adjoining owner on the other, has been slowly evolved from experience. It has been only at a recent period that these two distinct rights have, separately and in their relations to each other, come to be understood and defined with precision. The injustice to the abutting owner arising from the exercise of unrestrained legislative power over streets in cities was such that the abutter necessarily sought legal redress, and the discussion thence ensuing led to a more careful ascertainment of the nature of streets, and of the rights of the adjoining owner in respect thereof. It was seen that he had in common with the rest of the public a right of passage. But it was further seen that he had rights not shared by the public at large, special and peculiar to himself, and which arose out of the very relations of his lot

to the street in front of it; and that these rights, whether the bare fee of the streets was in the lot owner or in the city, were rights of property, and as such ought to be and were as sacred from legislative invasion as his right to the lot itself. In cities the abutting owner's property is essentially dependent upon sewer, gas and water connections; for these such owner has to pay or contribute out of his own purse. He has also to pay or contribute towards the cost of sidewalks and pavements. These expenditures, as well as the relation of his lot to the street, give him a special interest in the street in front of him, distinct from that of the public at large. He may make, as of right, all proper uses of the street subject to the paramount right of the public for all street uses proper, and subject also to reasonable and proper municipal and police regulation. Such rights, being property rights, are like other property rights under the protection of the Constitution."

The courts of New York, which formerly took another view, now hold that right of access is a valuable property right and entitled to constitutional protection as such. (*Steers* v. *Brooklyn*, 101 N. Y. 51; *Langdon* v. *New York*, 93 N. Y. 129.)

It is true that, in the later case of *Sage* v. *The Mayor*, (154 N. Y. 62,) it was held that the riparian rights of the owner of lots abutting on the Harlem River, a tide-water stream, are subordinate to the right of the city of New York, under its ancient charters supplemented by constitutional legislation and State grants, to fill in and make improvements, such as an exterior street, docks and bulkheads, from the high-water mark in front of his upland to and below low-water mark, essential to navigation and commerce, without compensation. But the opinion shows that the decision was put wholly upon the law of the State of New York, as declared in the authorities cited. Thus the language of Gerard in his work on Titles to Real Estate is adopted:

"It has been established in this State—New York—by judicial decision that the legislature of the State has an inherent right to control and regulate the navigable waters within the State. . . . The individual right of the riparian owner was considered as subject to the right of the State to abridge or destroy it at pleasure by a construction or filling in beyond his outer line, and that, too, without compensation made."

And again, the court says:

"In other States, some of the aurhorities are in accord, while others are opposed to the rule adopted in this State. The want of harmony is probably owing to the difference in the rule as to the ownership of the tideway, which is held in some jurisdictions to belong to the State, and in others to the riparian proprietors. This also accounts for the want of harmony in the Federal courts, as they follow the courts of the State where the question arose, unless some question arises under an act of Congress."

This case, therefore, must be regarded as an adjudication that, in the State of New York, the nature and extent of riparian rights are to be determined by the law of the State, and that the Federal courts, in passing upon such rights, follow that law.

In *Barkus* v. *Detroit*, (49 Mich. 110,) it was held by the Supreme Court of Michigan, per Cooley, J., that "the better and more substantial doctrine is that the land under the water in front of a riparian proprietor, though beyond the line of private ownership, cannot be taken and appropriated to a public use by a railway company under its right of eminent domain without making compensation to the riparian proprietor."

Leaving the decisions of the State courts, let us turn to those of this court, and I shall not consider it necessary to advert to the earlier decisions, because they are referred to and considered in the later ones.

Railway Company v. *Schumier*, (7 Wall. 272,) was a case involving the right of the complainant, Schumier, to enjoin the St. Paul &c. R. R. Company from taking possession and building its railroad upon certain ground in the city of St. Paul, Minnesota, bordering on the Mississippi River, and lying between lots of the complainant and that river. The railroad company claimed to own the land in fee under a Congressional land grant of May 22, 1857. The Supreme Court of Minnesota held that the complainant was entitled to a decree as prayed for; and this court, on appeal, affirmed the judgment of the Supreme Court of Minnesota, holding that, under the case of *Dutton* v. *Shirey*, (1 Black, 23,) although riparian owners are limited to the stream, still they also have the same right to construct suitable landings and wharves, for the convenience of commerce and navigation, as is accorded riparian properties bordering on navigable waters affected by the ebb and flow of the tide; and, speaking of the contention, on behalf of the railroad company, that the complainant had dedicated the premises to the public as a street, and had thus parted with his title to the same, this court said:

"Suppose the construction of that provision, as assumed by the respondents, is correct, it is no defense to the suit, because it is neverthelers true, that the municipal corporation took the title in trust, impliedly, if not expressly, designated by the acts of the party making the dedication. They could not, nor could the State, convey to the respondents any right to disregard the trust, or to appropriate the premises to any purpose which would render valueless the adjoining real estate of the complainant."

In *Yates* v. *Milwaukee*, (10 Wall. 497,) on appeal from the Circuit Court of the District of Wisconsin, it was *held* that the owner of land, bounded by a navigable river, has certain riparian rights, whether his title extend to the middle of the stream or not; that among these are free access to the navigable part of the stream, and the right to make a landing, wharf or pier, for his own use, or for the use of the public; that those rights are valuable, and are property, and can be taken for the public good only when due compensation is made. In the opinion, per Miller, J., it was said:

"Whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor

whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. . . . This riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation."

Accordingly this court reversed the decree of the Circuit Court, and instructed it "to enter a decree enjoining the city of Milwaukee, defendant below, from interfering with plaintiff's wharf, reserving, however, the right of the city to remove or change it so far as may be necessary in the actual improvement of the navigability of the river, and upon due compensation made."

The opinion in *Yates* v. *Milwaukee*, like that of the majority in the present case, may be liable to the criticism made upon it in *Shively* v. *Bowlby*, (152 U. S. 1, 36,) as having gone too far in saying that the owner of land adjoining any navigable water, whether within or above the ebb and flow of the tide, has, *independently of local law*, a right of property in the soil below high-water mark, and the right to build out wharves so far, at least, as to reach water really navigable. But so corrected, it is a direct authority for the proposition we are now considering, namely, that riparian rights, when recognized as existing by the law of the State, are a valuable property, and the subject of compensation when taken for public use.

In the case of *Weber* v. *Harbor Commissioners*, (18 Wall. 64,) it was said:

"It is unnecessary for the disposition of this case to question the doctrine that a riparian proprietor, whose land is bounded by a navigable stream, has the right of access to the navigable part of the stream in front of his land, and to construct a wharf or pier projecting into the stream for his own use, or the use of others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public, as was held in *Yates* v. *Milwaukee*. On the contrary, we recognize the correctness of the doctrine as stated and affirmed in that case."

In *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, (109 U. S. 682,) Mr. Justice Matthews, delivering the opinion of this court, quoted with approval the definition of a riparian owner and of his right of access to a navigable river in front of his lot, given by Mr. Justice Miller in *Yates* v. *Milwaukee*.

In *Illinois Central R. R. Co.* v. *Illinois*, (146 U. S. 445,) this court said: "The riparian proprietor is entitled, among other rights, as held in *Yates* v. *Milwaukee*, (10 Wall. 497,) to access to the navigable part of the water on the front of which lies his land, and for that purpose to make a

landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the public. In the case cited the court held that this riparian right was property and valuable; and though it must be enjoyed in due subjection to the rights of the public, it could not be arbitrarily or capriciously impaired."

In *Eldridge* v. *Trezevant*, (160 U. S. 452,) it was again held by this court, following *Hardin* v. *Jordan*, (140 U. S. 384,) and *Shively* v. *Bowlby*, (152 U. S. 1, 58,) that the nature and legal incidents of land abutting on navigable streams were declared by the law of the State wherein the land was situated. A bill was filed in the Circuit Court of the United States for the Western District of Louisiana by Eldridge, a citizen of Mississippi, against the board of engineers of the State of Louisiana and one Trezevant, who had been employed by that board to construct a public levee through a plantation belonging to the complainant and situated in Carroll township, State of Louisiana, in pursuance of an act of the general assembly of the State. The Circuit Court dismissed the bill, and an appeal was taken to this court. It appeared, and indeed was conceded by the appellant, that under the law and constitution of the State, and under French law existing before the transfer of the territory to the United States, land for the construction of a public levee on the Mississippi River could be taken, without compensation, by reason of a servitude on such lands for such a purpose. But it was contended on behalf of the appellant that, because he was a citizen of another State, and because he derived his title through a patent of the United States, that whatever may have been the condition of the ancient grants, no such condition attached to his ownership, and that the lands, bordering on a navigable stream, were as much within the protection of the constitutional principle awarding compensation as other property.

After reviewing the provisions of the constitution and laws of the State and the decisions of the State court construing them, and citing the Federal decisions, this court said:

"These decisions not only dispose of the proposition that lands, situated within a State, but whose title is derived from the United States, are entitled to be exempted from local regulations admitted to be applicable to lands held by grant from the State, but also of the other proposition that the provisions of the Fourteenth Amendment extend to and override public rights, existing in the form of servitudes or easements, held by the courts of a State to be valid under the constitution and laws of such State.

"The subject-matter of such rights and regulations falls within the control of the States, and the provisions of the Fourteenth Amendment of the Constitution of the United States are satisfied if, in cases like the present one, the State law, with its benefits and obligations, is impartially administered. (*Walker* v. *Sauvinet*, 92 U. S. 90; *Davidson* v. *New Orleans*, 96 U. S. 97; *Missouri* v. *Lewis*, 101 U. S. 22; *Hallinger* v. *Davis*, 146 U. S.

314.) The plaintiff in error is, indeed, not a citizen of Louisana, but he concedes that, as respects his property in that State, he has received the same measure of right as that awarded to its citizens, and we are unable to see, in the light of the Federal Constitution, that he has been deprived of his property without due process of law, or been denied the equal protection of the laws."

The case of *Gibson* v. *United States*, (166 U. S. 269,) is cited and relied on in the majority opinion. In that case the owner of a farm fronting on the Ohio River filed a petition in the Court of Claims complaining of the construction by the United States of a dike in the bed of the river, and which the plaintiff alleged to interfere with her landing. The principal finding of the Court of Claims was as follows:

"Claimant's access to the navigable portion of the stream was not entirely cut off; at a 9-foot stage of the water, which frequently occurs during November, December, March, April and May, she could get into her dock in any manner; that from a 3-foot stage she could communicate with the navigable channel through the chute; that at any time she could haul out to the channel by wagon."

The only injury suffered, therefore, by the plaintiff was the inconvenience of having to haul her produce by wagon over and across the dike in such portions of the year when the water was below a 3-foot stage, and when, at that part of the Ohio River, navigation was almost wholly suspended. At other times, and when the stage of the water permitted navigation, the plaintiff had the use of her dock. The Court of Claims dismissed the petition, and its decree was affirmed by this court. There was no pretense that the dike in question touched the plaintiff's land at any point.

The Chief Justice, in the opinion, put the judgment chiefly on the decisions of the State court. He said: "By the established law of Pennsylvania, as observed by Mr. Justice Gray in *Shively* v. *Bowlby*, 'the owner of lands bounded by navigable water has the title in the soil between high and low-water mark, subject to the public right of navigation and the authority of the legislature to make public improvemens upon it, and to regulate his use of it.'" And after citing several Pennsylvania cases, the Chief Justice concluded his opinion by saying: "In short, the damage resulting from the prosecution of the improvement of a navigable highway, for the public good, was not the result of a taking of the appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject." It is obvious, therefore, that in this case the court applied the doctrine of *Eldridge* v. *Trezevant*, which was cited in the opinion, and that the servitude to which the plaintiff's lands were said to be subject was a servitude existing under the State law, and not a servitude created by Federal law.

In the States which originally formed this Union, or in those admitted since, it has never been held that the United States, through any of their

departments, could impose servitudes upon the lands owned by the States or by their grantees. The cases are all the other way. (*New Orleans* v. *United States*, 10 Pet. 736; *Pollard* v. *Hagan*, 3 How. 212; *Barney* v. *Keokuk*, 94 U. S. 324; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 168 *Shively* v. *Bowlby*, 152 U. S. 1.)

In the recent case of *Morris* v. *United States*, (174 U. S. 196,) the question of the nature and extent of riparian rights on the Potomac River in front of the city of Washington was involved. The majority of the court held that, under the evidence, the title of the owners of lots in the city plans were bounded by Water street, and that, therefore, such owners possessed no riparian rights entitled to compensation by the United States in carrying out a scheme of improvement of the waters of the river.

The opinion of the court proceeded on the assumption, as matter of law, that owners of land abutting on the river would be possessed of riparian rights, and entitled, therefore, to compensation, if such rights were impaired or destroyed by the improvements proposed by the Government, but held, as a conclusion from the evidence, that, as matter of fact, the owners of lots under the city plans did not have titles extending to the river, but that their lots were bounded by Water street, the title to which was in the city, and therefore no compensation for exclusion from the river could be enforced. The case, therefore, may be properly regarded as an authority for the proposition that the owners of lots abutting on a navigable river are entitled to compensation if their riparian right of access is taken from them by improvements made by the Government to promote the navigability of the Potomac River. The long investigation by court and counsel was, indeed, labor in vain if, at last, riparian rights possessed by the lot owners, should be decided not to be private property within the protection of the Constitution.

If, then, by the law of the State in which the land is situated, the right of access to navigable streams is one of the incidents of abutting land, if such rights are held to be property and valuable as such, can the United States, under the incidental power arising out of their jurisdiction over interstate commerce, destroy such right of access without making compensation? I think that this question may well be answered in the words of Gould in his work on Waters, 2d ed., sec. 151: "When it is conceded that riparian rights are property, the question as to the right to take them away without compensation would appear to be at an end."

The argument against the right of compensation in such a case seems to be based upon an assumption that because the Government has the power to make improvements in navigable waters, it follows that it can do so without making compensation to the owners of private property destroyed by the improvements. But this assumption is, as I think, entirely without foundation, and, if permitted by the courts to be made practically

applicable, would amount to a disregard of the express mandate of the Constitution that private property shall not be taken for public uses without just compensation.

"The power to establish post offices and to create courts within the States was conferred upon the Federal government, and included in it was authority to obtain sites for such offices and for court houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain land for public uses. Its existence, therefore, in the grantee of that power ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The Fifth Amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken?" (*Kohl* v. *United States*, 91 U. S. 374.)

Accordingly in that case, a proceeding instituted by the United States to appropriate a parcel of land in the city of Cincinnati as a site for a post office and other public uses, was upheld, but those proceedings contemplated compensation, and Congress, in the act authorizing the proceedings, appropriated money for the purpose.

Now if, in order to render valid an appropriation of private property for the use of the Government in the erection of post offices and court houses compensation must be made, what is the difference in principle if the Government is appropriating private property for the purpose of improving the navigation of a navigable stream? This question has been already put and answered by this court in *Monongahela Navigation Company* v. *United States*, (148 U. S. 312,) where it was said:

"It cannot be doubted that Congress has the power in its discretion to compel the removal of this lock and dam as obstructions to the navigation of the river, or to condemn and take them for the purpose of promoting its navigability. In other words, it is within the competency of Congress to make such provision respecting the improvement of the Monongahela River as in its judgment the public interests demand. Its dominion is supreme.

"But like other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation."

"The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads; but if Congress wishes to take private property upon which to build a post office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. . . . And that which is true in respect to a condemnation of property for a post office is equally true when condemnation is sought for the purpose of improving a natural highway."

As already remarked, the power of the Government to control and regulate navigable streams and to carry into effect schemes for their improvement, is not directly given by the Constitution, but is only recognized by the courts as an incident to the power expressly given to regulate commerce between the States and with foreign nations.

Now, if it be held that Congress has power to take or destroy private property, lying under or adjacent to navigable streams, without compensating their owners, because it is done in the exercise of the power to regulate commerce, then it must follow that the same unlimited power can be exercised with respect to private property not in nor bounded by water. The power of Congress to regulate commerce is not restricted to commerce carried on in lakes and rivers, but equally extends to commerce carried on by land. If Congress, yielding to a loud and increasing popular demand that it should take possession and control of the railroads of the country, or should undertake the construction of new railroads as arteries of commerce, this novel notion, that the existence of the right to regulate commerce creates of itself and independently of the law of the State a Federal servitude on all property to be affected by the exercise of that right, would apply to all kinds of private property wherever situated.

But it may be asked why, if the question as to riparian rights is one of State law, the decision of the Supreme Court of Michigan in the present case, denying the claim of the abutting owner for compensation for the loss of his access to the river, is not conclusive?

The answer to this question will be found in the opinion of that court. Instead of ascertaining and applying, or professing to apply, the law of the State in respect to riparian rights, the Supreme Court of Michigan treated the question as one under Federal law, and, following what it understood to be the doctrine laid down by several Federal Circuit Court decisions as obligatory, held that it was competent for the Government of the United States, in the exercise of its power to regulate commerce between the States, to deprive abutting owners of their right of access to navigable streams, without compensating them for their loss. The cases so relied on were *Stockton* v. *Baltimore & N. Y. R. R. Co.*, (32 Fed. Rep. 9;) *Hawkins' Point Light House*, (39 Fed. Rep. 77;) and *Scranton* v. *Wheeler*, (57 Fed. Rep. 803.)

The first of these cases arose on a bill filed in the Circuit Court of the United States for the District of New Jersey by the attorney general of New Jersey, seeking to restrain the Baltimore and New York Railroad Company, acting under Congressional authority, from occupying without compensation land belonging to the State of New Jersey, lying under tide waters, by the pier of a bridge. Mr. Justice Bradley, refusing the injunction, said:

"The character of the State's ownership of the land under water—an ownership held, not for the purpose of emolument, but for public use, especially the public use of navigation and commerce—the question arises whether it is a kind of property susceptible of pecuniary compensation within the meaning of the Constitution. The Fifth Amendment provides only that *private property* shall not be taken without compensation, making no reference to public property. But if the phrase may have an application broad enough to include all property and ownership, the question would still arise whether the appropriation of a few square feet of the river bottom to the foundation of a bridge, which is to be used for the transportation of an extensive commerce in aid and relief of that afforded by the waterway, is at all a diversion of the property from its original use."

Mr. Justice Bradley was himself a New Jersey lawyer, and availed himself, in that case, of the law of that State, which has always been to the effect that the land underlying the tide waters belonged to the State, and was held for a public use. His view was that as, under the law of New Jersey, the land beneath tide waters was held by the State for public uses, such land was not *private property* within the meaning of the Constitution, or that, at all events, its occupation, to a limited extent, by the pier of a bridge intended to promote commerce, was not a diversion of the property from its original use.

It needs no argument to show that such a decision is not applicable to the present case. Indeed, it is plain that if the case had been one involving the right of an abutter to access to the tide water, the same being, under the laws of the State, private property, the decision of that learned justice would have been very different. He was the organ of this court in pronouncing the opinion in *Barney* v. *Keokuk*, (94 U. S. 324,) where the question was whether the title of riparian proprietors on the banks of the Mississippi extended to ordinary high-water mark or to the shore between high and low-water mark, and said:

"In our view of the subject the correct principles were laid down in *Martin* v. *Waddell*, (16 Pet. 347;) *Pollard's Lessee* v. *Hagan*, (3 How. 212;) and *Goodtitle* v. *Kibbe*, (9 How. 471.) These cases related to tide water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *The Genessee Chief*, (12 How. 443,) has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the States in which the lands are situated. In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject."

Whether the distinction suggested by Mr. Justice Bradley, between property held by the State for public purposes and private property, be or be not sound, the doctrine has no application to the present case, and, as the Circuit Court case was not brought for review to this court, the suggestion remains unadjudged.

The so-called Hawkins' Point Lighthouse case was an ejectment brought in the Circuit Court of the United States for the District of Maryland to recover possession of the land covered by a lighthouse erected on land lying under the waters of a tide-water navigable river, by the Lighthouse Board in pursuance of acts of Congress. The plaintiff claimed to be the owner of the submerged land, and the action did not involve the question of access to the river. Judge Morris held that the plaintiff was not entitled to recover; and, although stating that "the Court of Appeals of Maryland, whenever called upon to declare the nature of the title of the State and its grantees in the land at the bottom of navigable streams, has uniformly held that the soil below high-water mark was as much part of the *jus publicum* as the stream itself," extended Mr. Justice Bradley's suggestion in the New Jersey case, and declared that the plaintiff, as grantee of the State, had no private property in the submerged land entitled to constitutional protection. As the structure was a lighthouse the case might have been governed by peculiar considerations, but the learned judge of the Circuit Court seems to have gone further, and to have held that, as a matter of Federal law, "In the hands of the State or of the State's grantees the bed of a navigable river remains subject to an easement of navigation, which the General Government can lawfully enforce, improve and protect, and that it is by no means true that any dealing with a navigable stream which impairs the value of the rights of riparian owners gives them a claim to compensation." If, by this is meant that riparian owners may be deprived, without compensation, of access to navigable streams abutting on their land by reason of a supposed servitude or easement imposed by the power granted to Congress by the Constitution to regulate commerce, then, for the reasons heretofore given and under the authorities cited, such a view cannot be sustained. The case under the name of *Hill* v. *United States* was brought to this court, but the writ of error was dismissed on an independent ground, which rendered it unnecessary for this court to pass upon the questions ruled in the court below. That the question of the right of the plaintiff to be compensated for deprivation of his riparian rights was not considered, and, indeed, could not be, as it was held that neither the Circuit Court nor this court had jurisdiction. (*Hill* v. *United States*, 149 U. S. 593.)

Yet this was the case which the Supreme Court of Michigan said in their opinion "appeared to be exactly in point and to rule the present case."

The only other case relied on by the Supreme Court of Michigan was *Scranton* v. *Wheeler,* (57 Fed. Rep. 803; 16 U. S. App. 152,) being this identical case, which had been removed from the State to the Federal court. It was subsequently brought to this court, but was dismissed because the record did not show that a Federal question had been raised or presented in the plaintiff's statement of his case in the State court. Accordingly the cause was remanded to the State court, and subsequently reached this court by a writ of error to the Supreme Court of Michigan. While the case was in the Circuit Court of Appeals an opinion was filed by Circuit Judge Lurton, in which, without adverting to the law of the State of Michigan, or citing any decisions of the Supreme Court of that State, in respect to riparian rights, he held that the right of the plaintiff of access to the navigable water was subordinate to the power of the Federal government to control the stream for the purposes of commerce, and that the plaintiff was therefore not entitled to compensation for the extinction of his right.

The proposition, frequently made, that the power of Congress to regulate interstate commerce, and therefore navigation, is *paramount,* can properly be understood to mean only that, as between the authority of the States in such matters and that of the General Government, the latter is superior. It has no just reference to questions concerning private property lying within the States. Much less can it be rightly used to signify that such power can be exercised by Congress without regard to the right of just compensation when private property is taken for public use.

The suggestion that "the riparian owner acquired the right of access to navigability subject to the possibility that such right might become valueless in consequence of the erection under competent authority of structures on the submerged lands in front of his property, for the purpose of improving navigation," would seem to be irrelevant, because the liability that his private property may at all times be taken for public uses is known to every one. But hitherto it has not been supposed that the knowledge of such liability deprives the owner of the right of compensation when his property is actually so taken.

Nor can the statement that, in the opinion of this court, "it was not intended by the framers of the Constitution that the paramount authority of Congress to improve the navigation of the public navigable waters of the United States should be crippled by compelling the Government to make compensation for the injury to a riparian owner's right of access to navigability that might incidentally result from an improvement," be admitted. The *intention* of the framers is seen in the provisions of the Constitution, and in them the right to take private property for public uses is indissolubly connected with the duty to make just compensation. It cannot be supposed that a recognition of such a duty would cripple the Government

in the just exercise of the power it incidentally possesses to regulate interstate navigation.

As, then, the Supreme Court of Michigan considered the question solely as a Federal one, in which it supposed it was controlled by the Federal cases cited, this court has jurisdiction to review its judgment; and as by that judgment the plaintiff in error has been refused the protection of the Constitution of the United States claimed by him, I think the judgment should be reversed and the cause remanded to be proceeded in according to law.

Mr. Justice GRAY and Mr. Justice PECKHAM concur in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.